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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA.

FROM OCTOBER 21, 1907, TO FEBRUARY 25, 1908.

OFFICIAL REPORT.

VOLUME 36.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
Law Publishers and Law Booksellers.
1908.

Copyright, 1908.
BY
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AUG 21 1908

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The opinions in this volume of the Montana Reports have been edited and are reported, under the supervision of the Justices, by Mr. A. C. Schneider, a member of the bar of the supreme court.

(iii)

JUSTICES
OF
THE SUPREME COURT OF THE STATE OF MONTANA,
DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.
THE HON. HENRY C. SMITH, }

OFFICERS OF THE COURT.

ALBERT J. GALEN, Attorney General.
W. H. POORMAN, First Asst. Attorney General.
EDGAR M. HALL, Second Asst. Attorney General.
*WILLIAM L. MURPHY, Third Asst. Attorney General.
JOHN T. ATHEY, Clerk.
MARSHALL N. RACE, Marshal.
AUGUST C. SCHNEIDER, Court Stenographer.

*Appointed January 1, 1908, vice John G. Brown, resigned December 16, 1907.

ATTORNEYS AND COUNSELORS AT LAW

Admitted from December 5, 1907, to June 6, 1908.

BEERS, WILLIAM VANCE, Admitted February 3, 1908.

COLE, HALBERT B., Admitted May 8, 1908.

DAVIDSON, WILLIAM P., Admitted November 11, 1907.

DWYER, J. V., Admitted December 9, 1907.

FISHER, EDWARD F., Admitted December 20, 1907.

HAMNER, WALTER E., Admitted April 30, 1908.

JACKSON, JOSEPH R., Admitted December 9, 1907.

LOGAN, FLOYD J., Admitted December 9, 1907.

MASON, EDWIN K., Admitted December 5, 1907.

MATOUSHEK, FRANK J., Admitted December 5, 1907.

MURPHY, HOMER G., Admitted March 23, 1908.

SCHROEDER, LOUIS F., Admitted May 28, 1908.

SHEPHERD, RUSSELL E., Admitted January 15, 1908.

STEVENSON, R. G., Admitted December 9, 1908.

THORSEN, CARL O., Admitted June 6, 1908.

UPSON, JOHN E., Admitted March 3, 1908.

WEIR, TAYLOR B., Admitted March 17, 1908.

WOODWARD, HERBERT S., Admitted January 27, 1908.

DIRECTORY
OF THE
JUDICIAL DISTRICTS OF THE STATE OF MONTANA.
1908.

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Officers: County Attorney, A. P. Heywood, Esq.; Clerk of District Court, Sidney Miller; Sheriff, James A. Shoemaker.

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Officers: County Attorney, J. E. Murray, Esq.; Clerk of District Court, W. E. Davies; Sheriff, C. S. Henderson.

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Counties of Missoula, Ravalli and Sanders.

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Officers of Jefferson County (County Seat, Boulder)—
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Officers of Sweet Grass County (County Seat, Big Timber)
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District Judge, Hon. Jere B. Leslie.

Officers: County Attorney, J. W. Speer, Esq.; Clerk of District Court, Chas. C. Proctor; Sheriff, Edward Hogan.

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Counties of Gallatin and Broadwater.

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Officers of Broadwater County (County Seat, Townsend)—County Attorney, J. A. Matthews, Esq.; Clerk of District Court, F. Bubser; Sheriff, W. T. Deadmond.

TENTH JUDICIAL DISTRICT.

Counties of Fergus and Meagher.

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Officers of Fergus County (County Seat, Lewistown)—County Attorney, R. E. Ayers, Esq.; Clerk of District Court, J. B. Ritch; Sheriff, Edw. Martin.

Officers of Meagher County (County Seat, White Sulphur Springs)—County Attorney, W. L. Ford, Esq.; Clerk of District Court, A. C. Grande; Sheriff, Geo. L. Williams.

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Teton.

District Judge, Hon. John E. Erickson.

Officers of Flathead County (County Seat, Kalispell)—County Attorney, W. T. McKeown, Esq.; Clerk of District Court, J. K. Lang; Sheriff, W. H. O'Connell.

Officers of Teton County (County Seat, Chouteau)—County Attorney, P. I. Cole, Esq.; Clerk of District Court, S. McDonald; Sheriff, K. McKenzie.

TWELFTH JUDICIAL DISTRICT.

Counties of Chouteau and Valley.

District Judge, Hon. John W. Tattan.

Officers of Chouteau County (County Seat, Fort Benton)—County Attorney, F. A. Carnal, Esq.; Clerk of District Court, C. H. Boyle; Sheriff, Frank McDonald.

Officers of Valley County (County Seat, Glasgow)—County Attorney, J. L. Slattery, Esq.; Clerk of District Court, C. C. Beede; Sheriff, S. C. Small.

THIRTEENTH JUDICIAL DISTRICT.

Counties of Carbon, Rosebud and Yellowstone.

District Judge, Hon. Sydney Fox.

Officers of Carbon County (County Seat, Red Lodge)—County Attorney, Frank P. Whicher, Esq.; Clerk of District Court, H. A. Simmons; Sheriff, F. S. Bachelder.

Officers of Rosebud County (County Seat, Forsyth)—County Attorney, Geo. A. Horkan, Esq.; Clerk of District Court, D. J. Muri; Sheriff, R. J. Guy.

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*Appointed April 11, 1908, to fill unexpired term of J. T. Webb, deceased.

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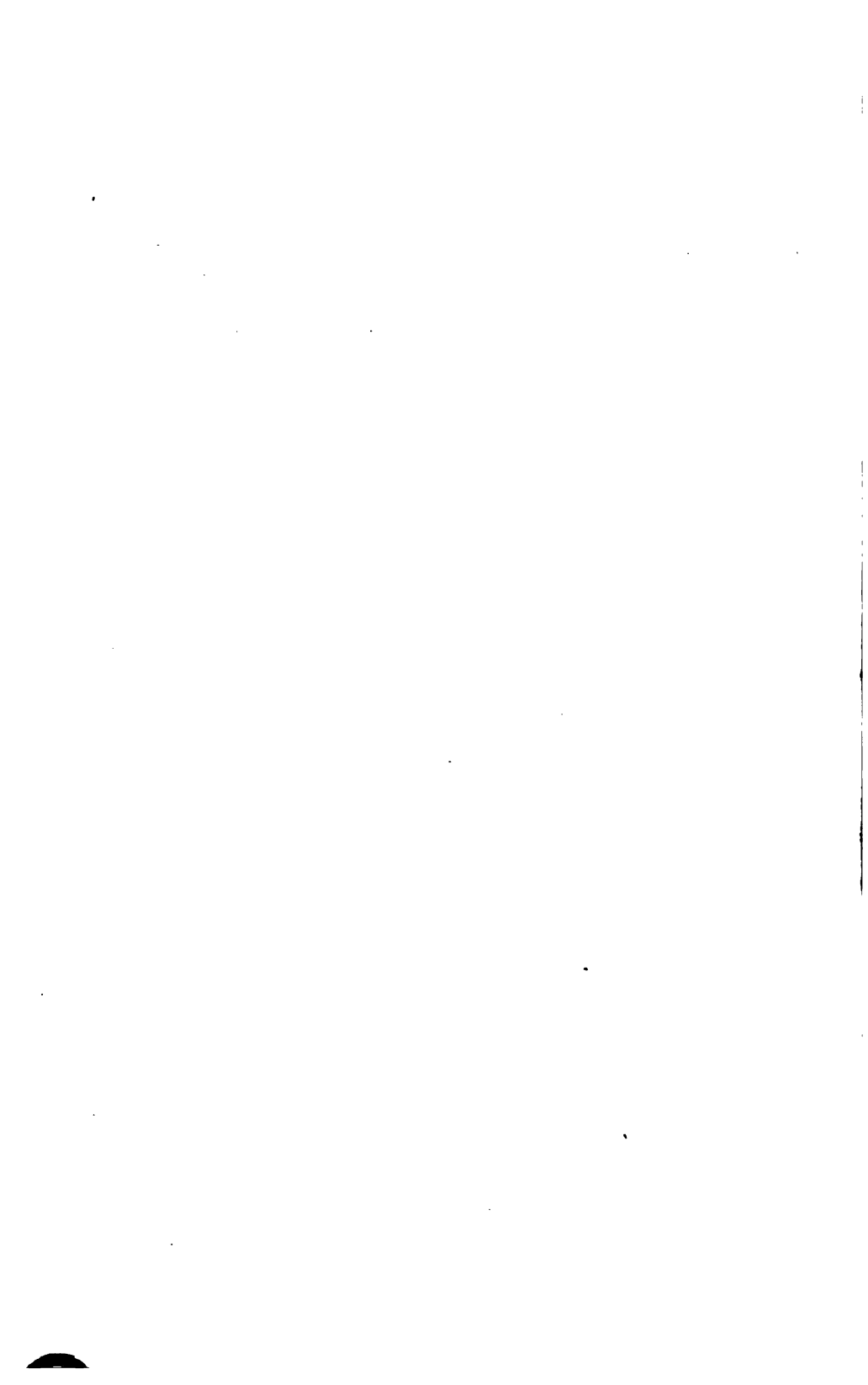


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SUPREME COURT RULES.

For Rules of the Supreme Court of the State of Montana, promulgated February 1, 1905, see Vol. XXX, Montana Reports, page xxix, and for Amendment of Rule IX, promulgated December 22, 1906, see Vol. XXXIII, page xxi.

(xxv)

CASES DETERMINED
IN THE
SUPREME COURT

AT THE
OCTOBER TERM, 1907.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY, }
THE HON. HENRY C. SMITH, } Associate Justices.

HAMILTON, APPELLANT, v. SMITH ET AL., DEFENDANTS; J. N.
NEVILLS CO., RESPONDENT.

(No. 2,420.)

(Submitted October 3, 1907. Decided October 21, 1907.)

[92 Pac. 32.]

*Bankruptcy—Effect of Petition—Chattel Mortgages—Transfer
of Property and Lien—Effect—Decisions of Supreme Court of
United States—Conclusiveness.*

Bankruptcy—Mortgages—Sales After Petition—Effect.

1. On June 9, 1902, a petition was filed in the United States district court to have a mortgagor of certain chattels declared a bankrupt. At this time the mortgagee was in possession of the property. On June 10th the mortgagor and mortgagee transferred their respective interests in the chattels to a company formed on the day preceding, receiving therefor shares of its stock. Subsequently the mortgagor was adjudged a bankrupt. The receiver, who later was appointed as trustee in bankruptcy, on June 12th commenced an action in claim and delivery to recover possession of the chattels transferred to the company. *Held*, that the company by the transaction did not simply step into the shoes of the mortgagee, but discharged his claim and left the

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(1).

chattels free from the mortgage lien, and that the sale of the chattels, made after the filing of the petition in bankruptcy and before final adjudication, was voidable at the election of plaintiff trustee.

Same—Mortgages—Merger.

2. Assuming that the mortgagor, referred to in the foregoing paragraph, sold his interest in the chattels to the company, and the mortgagee assigned his mortgage debt to it at the same time, the lien ceased to exist in that case also, since the lesser estate—the mortgage lien—became merged in the greater, represented by the legal title conveyed by the mortgagor.

Same—Filing of Petition—Caveat.

3. The filing of a petition in bankruptcy is in effect a *caveat* and gives notice to all the world; so that a sale of property belonging to a bankrupt, when made after the filing of such a petition and before final adjudication, is voidable at the option of the trustee in bankruptcy.

Same—Decisions of Supreme Court of United States—Conclusiveness.

4. In construing the provisions of the Bankruptcy Act, a decision of the supreme court of the United States directly applicable to the question presented to a state court is conclusive.

Appeal from District Court Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by James L. Hamilton, as trustee in bankruptcy of the estate of L. N. Nevills, against D. C. Smith, and the J. N. Nevills Company. From a judgment in favor of the Nevills Company, and from an order denying him a new trial, plaintiff appeals. Reversed and remanded.

Mr. John A. Shelton, for Appellant.

The filing of a petition in bankruptcy is in substance and effect an attachment and injunction, and it places the property of the bankrupt constructively in the custody of the court of bankruptcy. (Loveland on Bankruptcy, sec. 150; *In re Weinger, Bergman & Co.*, 126 Fed. 875.) Property on which there is a mortgage or other lien passes to the trustee in bankruptcy. It is, therefore, in the custody of the court of bankruptcy. (*In re Rochford*, 124 Fed. 182, 59 C. C. A. 388; *In re Kellogg*, 121 Fed. 333, 57 C. C. A. 547; *Chauncey v. Dyke Bros.*, 119 Fed. 1, 55 C. C. A. 579; *In re Booth*, 96 Fed. 943.) The absolute right of possession to the mortgaged property is in the receiver or trustee in bankruptcy. (*In re Kaplan*, 144 Fed. 159; *In re Knight*, 125 Fed. 35; *In re*

Jersey Island Packing Co., 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A., N. S., 560.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On May 28, 1902, J. N. Nevills executed and delivered to D. C. Smith his promissory note for \$2,940, due June 2, 1902, and to secure the payment of the same executed and delivered to Smith a chattel mortgage upon a stock of goods in Butte. The chattel mortgage was not filed for record until June 3, 1902, when a certified copy was placed in the hands of the sheriff of Silver Bow county, and he directed to sell the mortgaged property to satisfy the note, no part of which had been paid. The property was noticed for sale on June 9th, but before the sale was commenced a restraining order was secured, the sale abandoned, and the possession of the property turned over to Smith. On June 9th a petition was filed in the United States district court for the district of Montana by certain creditors of Nevills, asking that he be adjudged a bankrupt. On the next day, upon petition, James L. Hamilton, was appointed receiver to take charge of the property of Nevills and qualified as such receiver on June 11th, made demand for the possession of the stock of goods, and, upon being refused, commenced this action in claim and delivery on June 12th. In the meantime, on June 9th, a corporation called the "J. N. Nevills Company" was organized, and the articles of incorporation filed. On June 10th Smith and Nevills each transferred to the J. N. Nevills Company his interest in the stock of goods and received therefor shares of stock in the company. Afterward Nevills was adjudged a bankrupt, and Hamilton, who had been receiver, was now appointed trustee in bankruptcy, and substitution made in the proceedings. This action was commenced against Nevills, Smith, and the J. N. Nevills Company. Nevills defaulted, and upon the trial the plaintiff dismissed the action as against the defendant Smith. Upon the conclusion of the evidence the court granted a motion made by the defendant company and instructed the jury to return a verdict in its favor,

which was done, a judgment entered upon the verdict, and from that judgment, and an order denying him a new trial, the plaintiff appeals.

Upon the trial the plaintiff offered in evidence the files from the United States district court showing the filing of the petition in bankruptcy, the adjudication in bankruptcy, the petition for the appointment of a receiver, the order appointing the receiver, the oath and bond of the receiver, the bond of the trustee, the order approving that bond, and also the minutes of the Nevills Company showing the election of its officers and the transfer by Nevills and by Smith to that company; also the articles of incorporation of the company; and further offered evidence tending to show the value of the stock of goods and the fact that a redelivery bond had been given by the J. N. Nevills Company and the stock of goods returned to it after this action had been commenced. On behalf of the defendant company, evidence was offered which tended to show that Smith, the mortgagee, was in possession of the stock of goods from the third day of June until the 10th of June; that on that day the possession was delivered to the defendant company; that Smith was the president of that company, its largest stockholder and its manager; and that Nevills was a director and secretary of the company. The note and chattel mortgage given by Nevills to Smith were introduced. This was all the material evidence offered, and from this it appears that at the time of the filing of the petition in bankruptcy Smith was in the possession of the property under his chattel mortgage, and had he elected to continue to so hold it he could, so far as the record discloses, have successfully contested the claim of the plaintiff. But the rights of Smith were not adjudicated; in fact, the action was dismissed as to him and proceeded only as against the Nevills Company. That company and Smith were distinct persons, notwithstanding Smith was the largest stockholder in the company. The question for determination then was: What were the relative rights of the plaintiff and the company to the possession of the property at the time this action was commenced, on June 12, 1902?

Whatever may have been the rights of Smith, there cannot be any claim advanced upon this record that the company merely stepped into his shoes. There is not any pretense that Smith merely assigned his mortgage debt to the company. The sale of the property to the company was made by Nevills, who was the holder of the legal title to the property, and this sale was made after the petition in bankruptcy had been filed. Smith merely had a claim against Nevills which was secured by a lien upon the property. The company assumed to purchase the property from Nevills, and paid off and discharged Smith's claim. His debt was paid, and his lien discharged in law, if not in fact upon the record; and it is altogether immaterial that he accepted shares of stock in payment for his debt instead of demanding the money. This was the legal effect of the transaction, so far as this record discloses.

But even under the most favorable view which could be taken of the transaction—that Nevills sold his interest in the property, and Smith assigned his mortgage debt to the company—still the same result must be reached, for when the greater estate in the property, represented by the legal title which Nevills conveyed, and the lesser estate, represented by such mortgage lien so conveyed by Smith, coincided in one and the same person, the J. N. Nevills Company, at the same time and in the same right, the lesser estate at once became merged in the greater one, and the lien ceased to exist. This is the rule upon the showing made by this record. (20 Ency. of Law, 2d ed., 1064, and cases cited.)

The sale to the company, after the filing of the petition, and before the final adjudication in bankruptcy, was voidable at the election of the trustee. Under the present Bankruptcy Act of July 1, 1898 (Chapter 541, 30 Statutes at Large, 544 [U. S. Comp. Stats. 1901, p. 3428]), as under the Bankruptcy Act of 1867, the filing of a petition to have one adjudged a bankrupt is in effect a *caveat*, and, the proceedings being *in rem*, gives notice to all the world. (*Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *In re Weinger, Bergman & Co.* (D. C.), 126 Fed. 875.)

In speaking of the Bankruptcy Act of 1867, the supreme court in *Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866, said: "The filing of the petition was a *caveat* to all the world. It was in effect an attachment and injunction. Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. If that were in his favor, they revived and were again in full force. If it were against him, they were extinguished as to him and vested in the assignee for the purposes of the trust with which he was charged. The bankrupt became, as it were, for many purposes, *civiliter mortuus*. Those who dealt with his property in the interval between the filing of the petition and the final adjudication did so at their peril. They could limit neither the power of the court nor the effect of the final exercise of its jurisdiction. With the intermediate steps they had nothing to do. The time of the filing of the petition and the final result alone concerned them. In this case the title of the assignee is, in all respects, just what it would have been if the bankrupt had done nothing, and there had been no interposition by the appellants. Otherwise, the efficacy of the Act depended, not upon its own language and meaning, but was only what others outside of the proceedings might choose to permit it to be. This would be a solecism, and largely defeat the purpose of the statute and the policy of Congress in enacting it." This is directly applicable to the case at bar and conclusive upon this court, the question directly involved being the construction of a federal statute.

For the reasons stated, the judgment and order are reversed and the cause is remanded, with direction to the district court to grant the plaintiff a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

MACKEL, APPELLANT, v. BARTLETT, RESPONDENT.

(No. 2,421.)

(Submitted October 4, 1907. Decided October 21, 1907.)

[91 Pac. 1064.]

*Bankruptcy—Preferences—Findings—Evidence—Sufficiency.***Bankruptcy—Creditors—Preference—Findings—Evidence—Sufficiency.**

1. Evidence adduced in an action by a trustee in bankruptcy to recover a sum of money alleged to have been paid to defendant by his brother, a bankrupt, in preference over other creditors, when defendant had reasonable cause to believe that a preference was intended, examined and held to justify a finding that defendant did not have reasonable cause to believe that the bankrupt, when making payment, intended to give him a preference over other creditors.

Same—Preference—Proof.

2. For a trustee in bankruptcy to succeed in an action to recover the amount of an alleged preference, it is incumbent upon him to prove that defendant had reasonable cause to believe that his debtor, in making payment, intended to give him a preference, and that the debtor was then in fact insolvent; hence, mere grounds of suspicion on the part of the creditor that his debtor is in failing circumstances, or is insolvent, are not sufficient to avoid a payment to such creditor, even though it had the effect of giving him a preference over other creditors.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Alexander Mackel, as trustee in bankruptcy of the estate of Fredrick A. Bartlett, against Henry R. Bartlett, to recover an alleged preference made to defendant by the bankrupt. From a judgment for defendant, and an order denying plaintiff a new trial, he appeals. Affirmed.

Mr. John A. Shelton, for Appellant.

The question presented for determination is whether from the evidence before the court, the finding of the trial court to the effect that the defendant at the time of such preference did not have reasonable cause to believe that a preference was intended, is correct. This suit is in equity. (*Pond v. Bank*, 124 Fed. 992; *Houghton v. Stiner*, 92 App. Div. 171, 87 N. Y. Supp. 10; *Dyer*

v. *Kratzenstein*, 103 App. Div. 404, 92 N. Y. Supp. 1012; *Parker v. Black*, 143 Fed. 560; *Dokken v. Page*, 147 Fed. 438.) The fact that a money judgment alone is asked is not a test by which the question of whether jurisdiction is or is not in equity may be determined. (*Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207, 21 N. E. 75; *Rindge v. Baker*, 57 N. Y. 209, 15 Am. Rep. 475; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264, 8 L. Ed. 120.) Suits of this kind are commonly brought in equity. (*Bardes v. Bank*, 122 Iowa, 443, 98 N. W. 284; *Wright v. Skinner*, 136 Fed. 694; *Harris v. Bank*, 110 Tenn. 239, 75 S. W. 1053.)

The defendant had reasonable cause to believe, at the time the payment was made to the bank on February 6, 1899, that a preference was intended. (*Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130; *Hargreaves Bros. v. Hackney* (Neb.), 104 N. W. 855; *Dokken v. Page*, 147 Fed. 438.) The evidence was sufficient to place the defendant upon inquiry (and insolvency actually existing in fact), to charge the defendant with constructive notice of preferential intent on the part of the bankrupt. (*In re Nassau*, 140 Fed. 912; *Parker v. Black*, 143 Fed. 560; *Christopherson v. Oleson*, 19 S. Dak. 176, 102 N. W. 685; *Harris v. Bank*, 110 Tenn. 239, 75 S. W. 1053; *Capital Nat. Bank v. Wilkerson*, 36 Ind. App. 467, 75 N. E. 837; *Bardes v. Bank*, 122 Iowa, 443, 98 N. W. 284.)

Mr. John J. McHatton, for Respondent.

An action under the Bankruptcy Act, may be in certain instances in equity, and in certain instances at law. Wherever it is necessary to reach property and to have the exercise of the equitable jurisdiction of the court, to bring the same into a fund for the creditors, the action may be maintained in equity; but where the plaintiff frames his complaint, as in this case, and seeks a money judgment only, then the action would seem to be at law. (*Kaufman v. Tredway*, 195 U. S. 271, 25 Sup. Ct. 33, 34, 49 L. Ed. 190; *Sundheim v. Ridge Avenue Bank*, 138 Fed. 951, 953; *Wetstein v. Franciscus*, 133 Fed. 900, 67 C. C. A. 62; *In re*

Andrews, 135 Fed. 599; *Thomas v. Aldeman*, 136 Fed. 973; *Sessions v. Johnson*, 95 U. S. 347, 354, 24 L. Ed. 596; *Hodge v. Kohn*, 57 S. C. 69, 45 S. E. 102; *Harmon v. Walker*, 131 Mich. 540, 91 N. W. 1025; *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624, 94 N. W. 822, 824, 99 N. W. 675; *Sherman v. Luckhardt*, 96 Mo. App. 320, 70 S. W. 388; *Landis v. McDonald*, 88 Mo. App. 335; *Forbes v. Howe*, 102 Mass. 427, 436, 3 Am. Rep. 475; *Rice v. Grafton Mills*, 117 Mass. 228, 232; *Barbour v. Priest*, 103 U. S. 293, 26 L. Ed. 478.) We also call the court's attention to the foregoing cases on the proposition that mere supposition is not enough. It must be shown by satisfactory evidence that the intent to prefer existed, and that the defendant had reasonable grounds and cause to believe the same. (*Wilkinson v. Anderson-Taylor Co.*, 28 Utah, 346, 79 Pac. 46; *Turner v. Fisher*, 133 Fed. 594; *In re Goodhile*, 130 Fed. 473; *Stucky v. Masonic Savings Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640.) The mere fact of the failure to meet obligations when they fall due is not sufficient. (*Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624, 94 N. W. 824, 99 N. W. 675; *Lyon v. Clark*, 129 Mich. 381, 88 N. W. 1046.) The fact that one creditor is paid in full is not sufficient evidence. (*Kingsbury v. First Nat. Bank of Smith Center*, 71 Kan. 570, 81 Pac. 187.) The taking of security is not sufficient evidence. (*Empire State Trust Co. v. Fisher Co.*, 67 N. J. Eq. 88, 57 Atl. 502; *Hardy v. Gray*, 144 Fed. 922; see, also, *Jaquith v. Alden*, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717; *New York County Nat. Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380; *Yaple v. Dahl-Millikan Co.*, 193 U. S. 526, 24 Sup. Ct. 552, 48 L. Ed. 776.) The cases of *Hargreaves Bros. v. Hackney* (Neb.), 104 N. W. 855, and *Dokken v. Page*, 147 Fed. 438, cited by appellant, are not in point in this case. There was no sale of goods made to the defendant. The defendant was not directly a creditor of Frederick A. Bartlett; he was not taking something which might benefit him beyond the price which he might pay. The conditions in the cases cited are quite different from this. A person seeking to obtain a decided profit and preference for himself, such as in buying goods for

less than their value, will be required to observe diligence and good faith.

MR. JUSTICE HOLLOWAY delivered the opinion of 'the court.

On February 4, 1899, and for some time prior thereto, Frederick A. Bartlett was engaged in the mercantile business in Butte. On February 4th he sold his entire stock of goods to Ras Rochester. At that time he was indebted to the First National Bank of Butte in the sum of \$1,500, which indebtedness was evidenced by a promissory note upon which his brother, Henry R. Bartlett, this defendant and respondent, was surety. Immediately after the sale Frederick A. Bartlett gave Henry R. Bartlett a check, signed by Rochester, for something over \$1,530, with directions to pay the indebtedness to the bank, and such payment was made on February 6th, and the balance received from the check, over and above the amount of the indebtedness to the bank, was deposited in the name of Frederick A. Bartlett or his wife. For the purposes of this appeal it may be said that this payment to the bank was made at the instance and request of Henry R. Bartlett, though there seems to be some controversy as to this fact. On February 8th, Frederick A. Bartlett filed a petition asking that he be adjudged a bankrupt, and upon such adjudication the plaintiff herein was selected as trustee, qualified as such, demanded of Henry R. Bartlett that he turn over to the plaintiff an amount equal to the amount paid to the bank, and, upon his refusal to do so, this action was commenced.

The complaint alleges that the payment made to the bank was made with the intent to prefer Henry R. Bartlett over the other creditors of Frederick A. Bartlett, and that the defendant had reasonable cause to believe that such preference was intended. These allegations were denied in the answer. Upon the first trial the district court excluded certain evidence, offered by the plaintiff, and then granted defendant's motion for a nonsuit, and entered judgment in his favor. Upon appeal this court held that the ruling of the trial court in excluding the offered evidence was

erroneous, and remanded the cause for a new trial. (*Mackel v. Bartlett*, 33 Mont. 123, 82 Pac. 795.) Upon retrial the district court found that on February 6th Frederick A. Bartlett was insolvent, but that Henry R. Bartlett was "without reasonable cause to believe * * * that by payment of said note as aforesaid Frederick A. Bartlett intended to give him, Henry R. Bartlett, a preference over other creditors of said Frederick A. Bartlett." As a conclusion of law the court held that plaintiff was not entitled to recover, and entered judgment in favor of the defendant, from which judgment, and an order denying his motion for a new trial, the plaintiff appeals.

Appellant's specifications of error raise only the question of the sufficiency of the evidence to justify the finding and the conclusion of the court. There is some conflict in the evidence; but appellant insists that the testimony discloses facts and circumstances sufficient to have put Henry R. Bartlett upon inquiry, which, if pursued, would have led him to but one conclusion, viz., that it was intended to give him a preference over the other creditors of Frederick A. Bartlett. And it is true that some facts are disclosed by the testimony which, if standing alone, would seem to justify appellant's contention; but, when the testimony is considered as a whole, the conclusion of the district court seems to be fully sustained.

The liabilities of Frederick A. Bartlett listed in his petition in bankruptcy, exclusive of the Joseph A. Hyde claim, which the bankrupt testified he did not owe, amounted to \$4,734.48, and, including his indebtedness to the bank, his liabilities did not exceed \$6,264.48, while the bill of sale from Frederick A. Bartlett to Rochester, offered in evidence by the plaintiff upon this trial, recites that the consideration for the sale was \$6,344.25; and, in another action by this plaintiff against Rochester, plaintiff himself alleged that the stock of goods sold by Frederick A. Bartlett to Rochester exceeded in value the sum of \$8,563. In view of what appears to have been a studied effort on the part of counsel for plaintiff to avoid asking Frederick A. Bartlett, while on the witness stand as a witness for plaintiff, what amount in fact he

actually received from the sale of his stock of goods to Rochester, and the testimony of the defendant that he considered the stock of goods of a value greater than the amount of his brother's liabilities, that he advised his brother to sell, pay his debts, and start in business anew, that he did not know that his brother was in failing circumstances, that he believed he had money sufficient from the sale to pay his debts, and knew nothing of his contemplating bankruptcy proceedings until after the petition was filed, the finding and conclusion of the court attacked upon this appeal seem fully warranted.

Mere grounds of suspicion on the part of the creditor that the debtor is in failing circumstances, or is insolvent, are not sufficient to avoid a payment to such creditor, even though it has the effect of giving him a preference over other creditors. In order to succeed in his action, it was incumbent upon the plaintiff to prove that the defendant had reasonable cause to believe that his brother intended to give him a preference over other creditors, and this necessarily involves proof upon the part of plaintiff that defendant knew, or had reasonable cause to believe, that Frederick A. Bartlett was in fact insolvent when the indebtedness to the bank was paid. (*Des Moines Sav. Bank v. Morgan Jewelry Co.*, 123 Iowa, 432, 99 N. W. 121; *Barbour v. Priest*, 103 U. S. 293, 26 L. Ed. 478.)

While "insolvency," as used in Bankruptcy Act of July 1, 1898 (30 Statutes at Large, 544 [U. S. Comp. Stats. 1901, p. 3418]), has a meaning different from what the same term had in the Act of 1867 (Act March 2, 1867, 14 Statutes at Large, 517), still decisions by the courts upon questions arising under the Act of 1867 are applicable, in so far as they announce a rule of law for determining whether a creditor receiving a preference had reasonable cause to believe that his debtor was insolvent. A leading case upon this subject is *Grant v. Bank*, 97 U. S. 80, 24 L. Ed. 971, wherein, among other things, it is said: "It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to in-

validate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the Act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the Act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by law." (*Stucky v. Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640; see, also, *In re Eggert*, 102 Fed. 735, 43 C. C. A. 1, where the cases are reviewed at length.)

Finding no error in the record, the judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

MCCAULEY, APPELLANT, v. DARROW ET AL., RESPONDENTS.

(No. 2,385.)

(Submitted October 5, 1907. Decided October 21, 1907.)

[91 Pac. 1059.]

Promissory Notes—Payment—Burden of Proof—Instructions—Evidence.

Promissory Notes—Payment—Burden of Proof—Instructions.

1. Instructions, given in an action on a promissory note, that if it appeared by a preponderance of the evidence that payment had not been made, plaintiff was entitled to recover, and that, on the contrary, if it appeared in the same way that payment had been made, the defendants were entitled to a verdict, were not objectionable as casting the burden of proving nonpayment upon plaintiff, or because of the absence of a statement as to what should be done in case of an equipoise in the evidence on the issue of payment, and could not have misled the jury, where in other parts of the charge they had been told that the burden was upon defendants to establish payment by a preponderance of the evidence, and that plaintiff's possession of the note

was to be considered by them as *prima facie* evidence that it had not been paid.

Same—Instructions—Limiting Effect of Evidence—Issues.

2. Where defendants in an action on a promissory note pleaded full payment by a conveyance of real property to plaintiff, made in pursuance of an agreement to that effect, and no issue had been made as to a partial payment, an instruction which limited the effect of evidence tending to show the value of the property so conveyed, to the reasonableness or unreasonableness of the agreement entered into relative to the transfer, and failed to state what should be done in case the jury found that such conveyances discharged a part of the note only, was not error.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

ACTION by Julia E. McCauley against M. B. Darrow and another to recover on a promissory note. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

Messrs. Blackford & Blackford, for Appellant.

Plaintiff was not required to prove the negative allegation in the complaint of nonpayment, but the burden of proof of payment was on the defendants. (*Melone v. Ruffino*, 129 Cal. 514, 79 Am. St. Rep. 127, 62 Pac. 93; *Hurley v. Ryan*, 137 Cal. 461, 70 Pac. 292; *Stuart v. Lord*, 138 Cal. 672, 72 Pac. 142; *Guttermann v. Schroeder*, 40 Kan. 507, 20 Pac. 230; *Lerche v. Brasher*, 104 N. Y. 157, 10 N. E. 58; *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258.) The burden of proof was not only upon the defendants to prove payment (*Knox v. Gerhauser*, 3 Mont. 275), but having asserted that they paid it in something else than money, they also assumed the additional burden of proving that such conveyance by defendants to N. M. McCauley was taken and accepted by plaintiff in full satisfaction of the said promissory note and at her risk. (*Godfrey v. Crisler*, 121 Ind. 203, 22 N. E. 999; *Bradley v. Harwi*, 43 Kan. 314, 23 Pac. 566; *Borland v. Nevada Bank*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737; 2 Greenleaf on Evidence, sec. 516.) Where the court improperly places the burden of proof, the case will be reversed as a misdirection to the jury. (*Gallick v. Bordeaux*, 31 Mont. 328, 78 Pac. 583; *Willey v. Crane*, 69 Mich. 17, 36 N. W. 734; *Chicago*

& *A. R. Co. v. Murphy*, 198 Ill. 470, 64 N. E. 1011; *State v. Grinstead*, 62 Kan. 593, 64 Pac. 49.) The evidence relative to the value of the property was admitted without objection or limitation by the court or counsel for any particular purpose, and therefore instruction No. 6, in limiting its effect, was error. (*Chan v. Slater*, 33 Mont. 155, 82 Pac. 657; *Williams v. Mechanics' etc. Fire Ins. Co.*, 54 N. Y. 577; *Logansport & P. G. Turnpike Co. v. Heil*, 118 Ind. 135, 20 N. E. 703.) "An instruction which singles out and draws the attention of the jury to particular facts in evidence to the exclusion of others which are quite as important in determining the issues involved is erroneous." (Hughes on Instructions to Juries, sec. 113, and authorities cited; *Crain v. First Nat. Bank*, 114 Ill. 516, 2 N. E. 487; *Bibbins v. City of Chicago*, 193 Ill. 359, 61 N. E. 1030.)

Mr. Leonard De Kalb, and *Mr. O. W. Belden*, for Respondents.

Ordinarily, appellant would not have been obliged to prove the negative allegation in her complaint, to wit: "That no part of the said principal sum or the interest thereon has been paid, except," etc. But appellant was zealous in her efforts to get it clearly before the court that she was ready and willing to assume the burden of proving this negative allegation, along with the other material matters arising during the progress of the trial. And where a party assumes the burden of proof below, he will not be heard to complain on appeal that the burden was fixed by the court upon the wrong party. (2 Cyc. 675; *Benjamin v. Shea*, 83 Iowa, 392, 49 N. W. 989; *Denton v. Chicago etc. Co.*, 52 Iowa, 161, 35 Am. Rep. 263, 2 N. W. 1093; *Musser v. Maynard*, 55 Iowa, 197, 6 N. W. 55, 7 N. W. 500.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover the amount due upon a promissory note for the sum of \$2,000, made and delivered by

the defendants to the Bank of Fergus County on September 11, 1903, due four months after that date, with interest at the rate of ten per cent per annum, with reasonable attorney's fees, and assigned to plaintiff. *Inter alia*, the complaint alleges that no part of the principal sum or interest due upon the note has been paid, except the sum of \$266.68, which discharged the interest due up to January 11, 1905. Judgment is demanded for the principal sum and for interest due thereon from the last-mentioned date, and for \$200 as reasonable attorney's fees. The defendants, answering, admit the execution and delivery of the note to the bank and its assignment to plaintiff, deny all the other allegations of the complaint, and then allege that on or about the third day of March, 1905, the note was fully paid, satisfied and discharged. Upon this allegation there was issue by reply.

At the trial counsel for plaintiff, after having it identified, introduced in evidence the note, with the indorsements thereon, showing payments of interest to the amount of \$266.68, and, upon stipulation with counsel for defendants that the question of attorney's fees should be determined by the court, rested. Thereupon the defendants introduced evidence tending to show that prior to March 3, 1905, the defendant M. B. Darrow and the plaintiff and her husband, N. M. McCauley, had had several business transactions with each other, during the course of which defendant Melinda E. Darrow and McCauley became owners as tenants in common of residence property in Lewistown, Fergus county, for which they had paid \$6,500. In this transaction of purchase Melinda E. Darrow had become indebted to McCauley for borrowed money to pay in part for her interest in the property to the amount of \$1,250, represented by a promissory note bearing ten per cent interest. Darrow himself was indebted to McCauley to the amount of \$2,740 for borrowed money. This was also represented by a promissory note bearing ten per cent interest. Darrow and his wife were further indebted to the plaintiff in the sum of \$2,000, represented by the note in suit. Interest was due on these various

obligations amounting to several hundred dollars. Darrow and his wife had been occupying the property in Lewistown, but had paid no rent to McCauley. In the meantime they had expended about \$1,000 in the way of repairs and improvements. On March 3, 1905, the defendant M. B. Darrow and the McCauleys had a settlement of their affairs, the result of which, it is admitted by all parties, was a conveyance by the Darrows to McCauley of the Lewistown property, in consideration of the cancellation by the McCauleys of all the mutual indebtedness between the parties, with a release of the securities held for the \$1,250 and the \$2,740 notes, except the note in suit. The controversy in the evidence at the trial was whether this note was also included in the settlement, and thus discharged; the defendants claiming that it was, but that it had not been surrendered by plaintiff because it had been left by her at the Bank of Fergus County for safekeeping. According to their contention, she was to cancel and surrender it as soon as she could get it from the bank. The defendants had verdict and judgment. The plaintiff has appealed from the judgment and an order denying her a new trial.

The only question submitted is whether the court erred in its charge to the jury. Paragraphs 3 and 4 are the following:

“(3) The issue for the jury in this case to decide is whether or not the said promissory note was paid. If you believe from a preponderance of all the evidence that the note has not been paid, it will be your duty to find a verdict for the plaintiff in the sum of \$2,000, with interest thereon from the 11th day of January, 1905. If, on the other hand, you believe from a preponderance of the evidence that the said note has been paid by the defendants to the plaintiff, it will then be your duty to find for the defendants.

“(4) The gist of this action is the question whether or not, on or about the third day of March, 1905, the plaintiff entered into an agreement with the defendant M. B. Darrow that the promissory note for \$2,000, on which this action is based, should be included in the agreement made between N. M. McCauley

and the defendants on that date, and should be satisfied by the conveyance to the said N. M. McCauley of an undivided one-half interest in the residence situated at the corner of Main street and Eighth avenue, in Lewistown, Mont. If you believe from a preponderance of all the evidence that this note was included in the said agreement, and was to be satisfied by the said conveyance, then it is your duty to find for the defendants in this action. If on the other hand, you believe from a preponderance of the evidence that the said note was not included in the said agreement, and was not satisfied by the said conveyance, then it is your duty to find for the plaintiff."

It is argued that, while it was necessary for the plaintiff to make the allegation of nonpayment in order to show a breach of the contract, it was not incumbent upon her to prove this negative averment, but that the burden of pleading and proving payment rested upon the defendants. The complaint is that these instructions are erroneous, in that they cast the burden of proving nonpayment upon the plaintiff. Counsel support their contention by reference to several cases which discuss the question whether it is incumbent upon the plaintiff to allege in his pleading the fact of nonpayment and sustain it by proof at the trial, or whether the defendant must plead payment as a special defense and sustain the burden of proving it. We shall not venture upon an examination of this question. Under the view we take of the case, it is not necessary, for, assuming that plaintiff's contention is sustained by the weight of authority, we think the court clearly and distinctly cast the burden of proof upon the defendants. Whether they sustained it is a question not before us, for the reason that no complaint is made that the evidence was not sufficient to justify the verdict.

The instructions quoted state correct abstract propositions of law, for, if it appeared by a preponderance of the evidence that payment had not been made, the plaintiff was entitled to recover. On the contrary, if it appeared in the same way that payment had been made, the defendants were entitled to a ver-

dict. If the charge had stated nothing further, the jury might possibly have inferred that the averment of nonpayment in the complaint must have been established by a preponderance of the evidence, and that in case of an equipoise on this issue the defendants should recover. But in instructions 7 and 8 the court distinctly told the jury that the only issue in the case was whether the note had been included in the settlement of March 3, 1905, and thus discharged, and that the burden was upon the defendants to establish this fact by a preponderance of the evidence; otherwise they should find a verdict for the plaintiff. And in the ninth instruction the jury were further told that plaintiff's possession of the promissory note sued on was to be considered by them as *prima facie* evidence that it had not been paid. In view of this condition of the instructions, and in view of the further fact that the verdict was for the defendants, we do not think that the jury was misled by instructions 3 and 4, either because of the form of the statement therein, or because the court omitted to state what the jury should do in case they found the evidence to be evenly balanced on the issue of payment.

During the course of the trial, the defendants introduced evidence tending to show the value of the property in Lewistown; the purpose being to furnish foundation for an inference that the claim of the defendants that the settlement by which this property was conveyed to McCauley, in consideration of the cancellation of all the claims held by McCauley and the plaintiff against the defendants, was a reasonable one, under all the circumstances. Upon the effect that they should give to this evidence, the court instructed the jury as follows: "This testimony has been admitted, and should be considered by you, only so far as it relates to the reasonableness or unreasonableness of the agreement alleged by the defendants to have been entered into by and between them and the plaintiff on or about the third day of March, 1905." (Instruction No. 6.) It is argued that this instruction is erroneous in thus limiting the effect of this evidence. It is said that, if it appeared from this

evidence and that offered in rebuttal on the same subject by the plaintiff, that the value of this property was not equal to the full amount of all the notes, with interest, but was sufficient to pay them in part only, the court should have instructed the jury to find a verdict for such part of the amount of the note in suit as was not paid by the conveyance of the property. In this contention there is no merit. The contention of the defendants was that the note was fully paid off and discharged by the conveyance; it having been so agreed by the parties at the time. There was no middle ground, or any reason for consideration of the question whether there was any agreement that the conveyance should operate as a partial payment. There was no such issue made by the pleadings.

Finding no prejudicial error in the record, we are of the opinion that the judgment and order should be affirmed. It is so ordered.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

WALTER, JR., APPELLANT, v. COX, RESPONDENT.

(No. 2,428.)

(Submitted October 7, 1907. Decided October 21, 1907.)

[91 Pac. 1063.]

Justices of the Peace—Appeal—Counterclaims—Nonsuit.

1. Where defendant in an action before a justice of the peace failed to set up a then subsisting counterclaim upon which an action might have been brought in that court, he could not, under sections 1524 and 1525 of the Code of Civil Procedure, thereafter on appeal to the district court have it adjudicated, and a motion for nonsuit on the ground that by his failure he was barred from securing any relief was properly sustained.

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

ACTION by James S. Walter, Jr., against L. A. Cox. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

Messrs. McIntire & Kendall, for Appellant.

An action for unliquidated damages, the subject of this action, is not a counterclaim as defined by the Code, and that it could not be set up as a defense against respondent's cause of action on a contract. (*Wells v. Clarkson*, 2 Mont. 379; *Collier v. Ervin*, 3 Mont. 144.) This cause of action did not arise out of the contract or transaction set forth in the complaint and was not connected with the subject of the action. (Code Civ. Proc., sec. 691.) Section 1525, Code of Civil Procedure, provides that if defendant fails to set up a counterclaim, he cannot maintain an action against plaintiff therefor. The subject of this action is not a counterclaim as defined by said section of the Code. The penalty as prescribed in said section 1525 is for not setting up a counterclaim, and not for failing to set up another cause of action.

Mr. C. H. Foot, for Respondent.

Not only under the provisions of section 1524 of the Code of Civil Procedure, but under the terms of sections 690 and 691 of the same Code, if a cause of action existed in favor of defendant, it was a counterclaim existing at the time the respondent brought his action against him, and should have been set up in the first action between the parties. (See 12 Am. & Eng. Ency. of Pl. & Pr. 724; *Goebel v. Hough*, 26 Minn. 252, 2 N. W. 848; *Sheilby v. Dixon Co.*, 61 Neb. 409, 85 N. W. 399; *Branch v. Chappel*, 119 N. C. 81, 25 S. E. 783; *Streeper v. Thompson et al.* (Tex. Civ. App.), 23 S. W. 326; *De Witt v. Cullings*, 32 Wis. 298; *Harlan v. St. Paul etc. R. R.*, 31 Minn. 427, 18 N. W. 147; *Lancaster Mfg. Co. v. Colgate*, 12 Ohio St. 344; *Griffin v. Moore*, 52 Ind. 295; *Harris v. Curet*, 9 Abb. Pr., N. S., 199; *Fraker v. Cullom*, 24 Kan. 679; *Hade v. McVey*, 31

Ohio St. 231; *Merrill v. Nightingale*, 39 Wis. 247; *Eaton v. Wolly*, 28 Wis. 628.)

Either liquidated or unliquidated damages may be made the subject of a counterclaim. (*Wheelock v. Pacific Co.*, 51 Cal. 223; *Morrison v. Lovejoy*, 6 Minn. 319 (Gil. 224); *Empire Trans. Co. v. Boggiano*, 52 Mo. 294; *Barnes v. McMullins*, 78 Mo. 260; *Shubert v. Harteau*, 34 Barb. 447; *Parsons v. Sutton*, 66 N. Y. 92.) That unliquidated claim for damages may be set up as a counterclaim where it is within sections 691 and 692, *supra*, the following cases establish: *Potter v. Lohse*, 31 Mont. 91, 77 Pac. 419; *Osmero v. Furey*, 32 Mont. 581, 81 Pac. 345; *Niver v. Nash*, 7 Wash. 558, 35 Pac. 380; *Hanson v. Yturria* (Tex. Civ. App.), 48 S. W. 795; *Clement v. Field*, 147 U. S. 467, 13 Sup. Ct. 358, 37 L. Ed. 244; *Stoddard v. Treadwell*, 26 Cal. 294, 309; *Van Epps v. Harrison*, 49 Am. Dec. 314, and authorities collected in note.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action originated in a justice of the peace court, and was brought into the district court by appeal. It was brought to recover damages alleged to have resulted to the plaintiff from the burning of certain grain and straw of the plaintiff, through the negligence of defendant while threshing for plaintiff. It is alleged that the negligence of defendant caused a loss to the plaintiff of one hundred and sixty bushels of grain, of the value of \$107.20, and of straw of the value of \$15. Judgment is demanded for \$122.20.

The answer, among other defenses, contains the following:

“(1) That at the time of the commencement of said action another action was pending in said court, wherein this defendant was plaintiff and said plaintiff was defendant, wherein the defendant herein sought to recover of said plaintiff as defendant a judgment for the sum of \$100.28.

“(2) That thereafter and on the second day of January, 1906, a judgment was duly given and made in said action, wherein

this defendant was plaintiff and said plaintiff was defendant, against said plaintiff and in favor of this defendant.

“(3) That at the time of the commencement of the above-entitled action the pretended cause of action set forth in plaintiff's complaint herein existed against this defendant, if it existed at all, and if the plaintiff had a cause of action against this defendant it was a counterclaim against the cause of action set forth by this defendant in his complaint against said plaintiff, and as such should have been set up as a counterclaim in said action.

“(4) That plaintiff wholly failed, neglected, and refused to set up such counterclaim in said action of this defendant against said plaintiff, and that therefore under sections 1524 and 1525 of the Code of Civil Procedure of the state of Montana said plaintiff cannot maintain an action against this defendant for the amount, or any part thereof, or upon the cause of action, or any part thereof, set forth in plaintiff's complaint herein.”

During the hearing of plaintiff's evidence, the facts set forth in this special defense were admitted by the plaintiff and his counsel. When the plaintiff rested, the defendant interposed a motion for nonsuit on two grounds: First, that the evidence submitted did not sustain the allegations of plaintiff's complaint; and, second, that it appeared therefrom that the action was barred by reason of the fact that the plaintiff, having a cause of action against the defendant of which the justice's court had jurisdiction at the time the defendant had brought his action, as set forth in the answer, had failed to set it up as counterclaim. The court sustained the motion and directed judgment for the defendant. The plaintiff has appealed from the judgment and an order denying his motion for a new trial.

We are of the opinion that the motion was properly granted on the second ground. It is admitted by plaintiff's counsel that, if the cause of action stated in the complaint was such that it might have been set up as a counterclaim in the former action between the parties, it should have been so alleged and settled in that action. He insists, however, that this course

could not have been pursued, because it is apparent that the cause of action as stated could not properly have been pleaded as a counterclaim, under the rule declared by section 691 of the Code of Civil Procedure. The provisions of this section have no application. The rules governing actions in justices' courts in this particular are found in sections 1524 and 1525 of this Code, and are exclusive. They are clear and explicit, and demonstrate that it was the policy and purpose of the legislature in enacting them that all petty claims existing between the parties and falling within the limited jurisdiction of justices' courts, as declared in section 66 of the same Code, should be adjusted in one action. Section 1524 declares what defenses may be made. These are: (1) A general denial of plaintiff's cause of action, and (2) "a statement, in plain and direct manner, of any other facts containing a defense or counterclaim, upon which an action might be brought by the defendant against the plaintiff in a justice's court." It will be noted that the only limitation upon the defense of counterclaim is that it must be one upon which an action might be brought in a justice's court. It makes no difference whether it meets the requirements of section 691, *supra*, or not. If the defendant fails to set it up and have it adjudicated, neither he nor his assignee can thereafter maintain an action thereon. (Sec. 1525.) That this is the purpose and effect of these provisions is clear from the fact that it is no ground of objection to the answer that counterclaims have been improperly joined therein. (Sec. 1526.)

Since this point is conclusive of the case, it is not necessary to consider other matters argued in the briefs of counsel.

Let the judgment and order be affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

JUDITH INLAND TRANSPORTATION CO., RESPONDENT, v.
WILLIAMS, APPELLANT.

(No. 2,431.)

(Submitted October 8, 1907. Decided October 21, 1907.)

[91 Pac. 1061.]

Actions—At Law—In Equity—Theory of Case—Principal and Agent—Pleadings—Demand—Instructions.

Principal and Agent—Recovery of Money Collected by Agent—Accounting—Pleadings—Theory of Case.

1. Plaintiff company sued to recover moneys, collected by defendant while acting as its agent, which he failed to pay over after demand. By a second count, a sum of money, alleged to have been collected by defendant for other parties, while acting as plaintiff's agent, but which he neglected to forward to the persons entitled thereto and which plaintiff was required to pay, was sought to be recovered. Full payment of plaintiff's claim was pleaded by defendant, and judgment in a fixed amount demanded by way of counterclaim. There was no allegation in the answer that an accounting was necessary and none was asked. The action was tried as one at law to recover a money judgment. *Held*, that the action was one at law and not a suit in equity for an accounting.

Same—Nonsuit—Demand—When not Necessary.

2. A motion for nonsuit made in an action by plaintiff, an express and passenger transportation company, to recover from its agent money collected for it but not turned over, on the ground that proper demand had not been pleaded or proved, was properly overruled, where the complaint alleged failure to pay, "although frequently requested by plaintiff so to do," and where plaintiff's testimony disclosed some evidence of a demand on plaintiff's part.

Same—Demand—When Unnecessary—Instructions.

3. Where it appeared that defendant in the action set out in the above paragraph had always claimed that plaintiff's demand had been fully satisfied, and that, instead of being indebted to plaintiff, the latter was indebted to him, no formal demand upon him for payment was necessary; and in refusing an instruction charging that, in the absence of an allegation that demand had been made, plaintiff could not recover, was properly refused.

Appeal—Instructions—Refusal—When not Error.

4. Error cannot be predicated upon the refusal of an instruction not justified by the evidence.

• *Appeal from District Court, Fergus County; E. K. Cheadle, Judge.*

ACTION by the Judith Inland Transportation Company against C. H. Williams. From a judgment for plaintiff, and an order

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overruling a motion for a new trial, defendant appeals. Affirmed.

Mr. Leonard De Kalb, Mr. E. W. Mettler, and Mr. O. W. Belden, for Appellant.

Mr. J. C. Huntoon, and Mr. E. G. Worden, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

The nature of this action is put in issue in this court, although there seems to have been no such question raised by counsel in the court below. The defendant now claims that this is an equitable action for an accounting, while plaintiff contends that it is an action at law, to recover a money judgment, fixed in amount, as set forth and demanded in the complaint.

The first cause of action pleaded is to recover the sum of \$1,748.31, being a balance of moneys collected by the defendant, while acting as plaintiff's agent, which defendant has failed to pay over, after plaintiff had "demanded from the defendant the payment of all moneys belonging to this plaintiff." By its second cause of action plaintiff seeks to recover the sum of \$105, being the amount collected on several C. O. D. packages by defendant, which amount he failed to forward to certain express companies, as was his duty, and which amount of \$105 plaintiff was compelled to and did pay to the said express companies.

Defendant by his answer avers that he has paid over to the plaintiff all moneys collected by him, except the sum of \$96.38, which is still in his hands; and by way of counterclaim alleges that plaintiff is indebted to him in the sum of \$922.81, balance due him as commissions on the business transacted by him for plaintiff, and demands judgment for that sum. The allegations of this counterclaim are all put in issue by the reply. Plaintiff had a verdict for \$1,853.31, with interest, and from a judgment entered thereon, and an order overruling his motion for a new trial, defendant appeals.

We have carefully examined these pleadings. The cause was tried to the court sitting with a jury, to which all the issues were submitted. Defendant's counsel proposed certain instructions to the court to be given to the jury, and took exception to the action of the court in refusing them. There is no allegation in the answer that an accounting was necessary in order to arrive at the amount due the plaintiff, nor to ascertain how the accounts between the parties stood, and no accounting was asked for in the answer. Full payment of plaintiff's claim was pleaded, and judgment in a fixed amount demanded by way of counterclaim. We are clearly of opinion that this is an action at law to recover a money judgment, ascertained and certain in amount, clearly set forth in the complaint, and that the same was so regarded at the trial by counsel for the defendant, notwithstanding a remark of the learned trial judge, as shown in the record, that this is a suit for an accounting.

At the close of plaintiff's case, the defendant interposed a motion for a nonsuit, as follows: "If the court please, at this time the defendant moves for a nonsuit on the ground that the plaintiff fails to allege in his complaint any sufficient demand having been made, and he fails wholly to allege that a refusal to pay has been entered up by Mr. Williams, and for the further reason that the evidence in the case fails to cure this in this particular. There has been no definite amount mentioned by Mr. Mears demanded of Mr. Williams. Now, we take it that in a case of this kind those things are essential—are essential and necessary." By the phraseology of this motion the defendant's counsel shows that he regarded this as an action at law. In his brief the defendant argues that this motion should have been granted, because "there was no allegation of demand for a general accounting, and because no proof was introduced of any demand for a general accounting, or, indeed, proof of any sufficient demand to support a cause of action, for a money judgment, by a principal against an agent." It will be readily seen from the wording of the motion that it contains no reference to a general accounting. And, in so far as it relates to a demand for money, it is only

necessary to say that the motion for a nonsuit refers generally to both causes of action, and in its second cause of action plaintiff alleges "that the defendant has not paid said sum of \$105, or any part thereof, to this plaintiff, although frequently requested by plaintiff so to do."

We think the complaint sufficiently alleges a demand in each cause of action. An examination of the testimony offered by the plaintiff discloses that there was some evidence of a demand under each cause of action, before suit brought. This disposes of the motion for a nonsuit.

But was a demand necessary? This brings us to a consideration of the instructions refused by the court. They are as follows: Instruction No. 4, requested by the defendant: "The jury are instructed that it is a material allegation of the complaint that the plaintiff demanded the amount sued for of the defendant before the institution of this action, and, unless you find by a preponderance of all the evidence that the plaintiff did make a demand of the defendant and apprise him of the amount due at the time of making such demand, then it will be your duty to find for the defendant." Instruction No. 3, refused by the court: "You are further instructed, if you find from all the evidence that the plaintiff made such demand, then you are instructed that it was incumbent upon him [it] to specify substantially the correct amount due at the time of making such demand, and that a demand from him [it] of a materially greater amount than he [it] claims to be due in its complaint in this action would vitiate such demand."

The testimony shows that the plaintiff company was engaged in the express and passenger business between Lewistown and Harlowtown, and that defendant was its agent at Lewistown. John L. Mears was the general manager of the plaintiff, and one Frank McKechnie was an employee of the defendant, Williams, and seems to have had general charge, as such employee, of the transportation company's business, with the knowledge and consent of Mears. McKechnie kept the books of the agency. There is testimony tending to show that, when Williams' agency

terminated, he failed to pay over to plaintiff the balance remaining in his hands of moneys collected by him. Williams' agency terminated about the middle of April, 1902, and this action was begun on March 25, 1903. It clearly appears from the testimony of the defendant himself, that he has always claimed that he had fully paid plaintiff all moneys collected for it by him, and that, instead of being indebted to plaintiff, the plaintiff was indebted to him. He pleaded this in his answer, and attempted to prove the same at the trial. Under these circumstances, no formal demand upon him was necessary.

In the case of *Walradt v. Maynard*, 3 Barb. (N. Y.) 584, the court said: "The legitimate object of a demand is to enable the party to discharge the liability agreeably to the nature of it, without a suit at law. If he denies the liability, or the right of the other to call upon him, a demand must be as unnecessary as it would be useless."

In the case of *Wiley v. Logan*, 95 N. C. 358, the court said: "A demand previous to bringing an action for money collected by an agent is to enable the latter to pay it over without incurring the cost of suit, for the principal must seek him, and not he the principal. But a demand is not required where the agency is denied, or a claim set up exceeding the amount collected, or the agent's responsibility is disputed in the answer." (See, also, *Ayer v. Ayer*, 16 Pick. (Mass.) 327, and *Mechem on Agency*, sec. 531.)

Our own court has passed upon the principle herein involved. In the case of *Christiansen v. Aldrich et al.*, 30 Mont. 446, 76 Pac. 1007, the court uses this language, in a case involving the specific performance of a contract: "It is said that the complaint is defective for failing to show a tender of the balance of the purchase money before the action was brought. It is undoubtedly the general rule that, if a part of the purchase price is still due and payable, the plaintiff seeking to have the conveyance compelled must allege and prove a tender of it, and bring it into court. But the rule is not invariable. An exception to it is where it is apparent from the pleading that a

tender would be useless. 'Where the vendor claims to have rescinded, repudiates, and denies the obligation of the contract, placing himself in such a position that it appears that, if the tender were made, its acceptance would be refused, then no tender need be made by the vendee.' "

The appellant has directed our attention to the case of *Anderson v. Hulme*, 5 Mont. 295, 5 Pac. 865, in which it was held, in effect, that, in an action for money had and received by an agent or attorney for the use of the plaintiff, it is necessary to allege a demand and refusal to pay before recovery can be had, and such demand will not be presumed. The question in that case did not arise upon the evidence, which was not in the record; but the defendant contended that the complaint did not state a cause of action because of the absence of an allegation of demand before suit brought. It appears from the report of that case that the question as to the necessity of pleading a demand, in view of the allegations of the answer, was not called to the attention of the court. In the case at bar, however, the question before the trial court was not whether the complaint stated a cause of action, but whether, in view of the issues made by the pleadings and the testimony as presented to the jury, any demand was necessary.

We are of opinion that the trial court was clearly correct in refusing to give to the jury any instructions on the question of demand.

The only other point urged by appellant is that the court erred in refusing the following instruction, requested by him: "You are instructed that if you find, from all the evidence in the case, that Mr. McKechnie was employed by the defendant, Williams, as subagent, with the express or implied assent thereto of the Judith Inland Transportation Company, through its managing agent, J. L. Mears, then if you further find from all the evidence in the case that the accounts and collections testified to were handled and attended to in a negligent manner, or the affairs of the business were by him improperly conducted, and the amount sued for was lost to the plaintiff occasioned

by such negligence or misconduct of McKechnie as such sub-agent, after such assent being expressly or impliedly given, then you are instructed that the defendant is not liable to the plaintiff for such acts of McKechnie as his subagent. The assent of such appointment may be given either expressly, by word of mouth, or by implication. Assent may be implied by conduct of the plaintiff, the usage of trade, or the nature of the business to be conducted." The court, in lieu thereof, instructed the jury as follows: "You are instructed that the agent is responsible for the acts of his subagent connected with the carrying out of the agency, and the court instructs you further that, if you believe from the evidence that the moneys belonging to the plaintiff were collected by the defendant or his subagent, McKechnie, and were not turned over to the plaintiff, the Judith Inland Transportation Company, through the fault or negligence of the subagent, McKechnie, that fact if you find it to be true does not in any way relieve the defendant from his liability to pay such money so collected to the plaintiff, and you will, accordingly, find for the plaintiff for any such money so collected and not turned over or paid out for the plaintiff within the scope of the defendant's agency."

It is sufficient answer to this contention to say that there is no evidence in the record to show that anyone has suffered any loss by reason of the fact that the accounts and collections were handled or attended to in a negligent manner, or that the amount sued for was lost to plaintiff by reason of negligence or mismanagement on the part of McKechnie, or anybody else. The evidence, as we read it, shows that an examination of the accounts disclosed that defendant had failed to turn over to plaintiff all moneys received by him, and that he himself was so ignorant of the real state of the accounts that he was unable to know whether he was indebted to plaintiff or not.

The judgment of the court below is affirmed. .

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

HENSLEY, APPELLANT, v. CITY OF BUTTE ET AL., RESPONDENTS.

(No. 2,438.)

(Submitted October 10, 1907. Decided October 21, 1907.)

[92 Pac. 34.]

Cities and Towns—Improvement Districts—Objections—Manner of Presentation.

Cities and Towns—Improvement Districts—Rights of Objectors.

1. Under the provisions of section 31 of the Act of 1907 (Sess. Laws 1907, p. 219), owners, or agents of owners, of more than one-half in area of all the property to be affected by a proposed improvement district, have the absolute right to appear before the city or town council at the time and place mentioned in the resolution looking to the creation of such district, and to be heard in protest, either orally or in writing; whereupon the contemplated improvement cannot then be made, even though the objectors assign no reason for their action.

Same—City Council—Powers.

2. Owners, or agents of owners, representing fifty per cent or less of all the property affected by a proposed improvement district in a city or town, may, under section 31 of the Act of 1907 (Sess. Laws 1907, p. 219), appear before the council and show cause why the improvement should not be made, it being optional, however, with that body to act favorably or otherwise on such remonstrance.

Same—Improvements—Objections—Personal Appearance—City Clerk.

3. *Held*, that the Act of 1907 (Sess. Laws 1907, p. 219) makes it obligatory on owners of real property, or agents representing them, to appear personally, by agent or counsel, before the city or town council for the purpose of objecting to the creation of an improvement district; by presenting formal written objections, or by showing cause in any other suitable manner; that while it is not necessary that each protestant appear in person, each must be represented, although all may be represented by one person, and that protests left at the city clerk's office for presentation are of no avail.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Lavina Hensley against the city of Butte and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Messrs. McBride & McBride, and Mr. James E. Murray, for Appellant.

"Where the law provides that the particular improvement shall be petitioned for or assented to by a majority, or some other defined proportion, of the parties concerned, such provision is justly regarded as of very great importance, and a failure to observe it will be fatal at any stage of the proceeding." (2 Cooley on Taxation, 3d ed., 1247; *Keese v. Denver*, 10 Colo. 112, 15 Pac. 825; *Merritt v. City of Kewanee*, 175 Ill. 537, 51 N. E. 867; *Hammond v. Leavitt*, 181 Ill. 416, 54 N. E. 982; *City of Carlysle v. County of Clinton*, 140 Ill. 512, 30 N. E. 782; *Lindsay v. City of Chicago*, 115 Ill. 120, 3 N. E. 443; *City of East St. Louis v. Albrecht*, 150 Ill. 510, 37 N. E. 934; *City Street Improvement Co. v. Babcock*, 123 Cal. 205, 55 Pac. 762; *Pacific Paving Co. v. Reynolds*, 130 Cal. 18, 62 Pac. 212.)

"Where the power to pave depends upon the assent or petition of a given number of the proprietors to be affected, this fact of assenting is jurisdictional." (2 Dillon on Municipal Corporations, sec. 800; Brown on Jurisdiction, p. 574, sec. 169a; *Los Angeles Lighting Co. v. City of Los Angeles*, 106 Cal. 156, 39 Pac. 535; see, also, *Armstrong v. Ogden City*, 12 Utah. 476, 43 Pac. 119, 120; *Zeigler v. Hopkins*, 117 U. S. 683, 6 Sup. Ct. 919, 29 L. Ed. 1019; *Mulligan v. Smith*, 59 Cal. 229.) The statute should have been considered liberally in favor of the citizen and strictly against the city. (*City Street Improvement Co. v. Babcock*, 139 Cal. 690, 73 Pac. 666; *Batty v. City of Hastings*, 63 Neb. 26, 88 N. W. 141; *Marion Co. v. City of Indianapolis* (Ind. App.), 75 N. E. 834.)

Mr. L. P. Forestell, Mr. E. S. Booth, Mr. W. E. Carroll, Mr. E. M. Lamb, and Mr. I. A. Cohen, for Respondents.

MR. JUSTICE SMITH delivered the opinion of the court.

This action was begun in the district court of Silver Bow county to enjoin the defendants from collecting a certain assessment.
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assessment of taxes made by the city of Butte for the purpose of paying the costs and expenses of paving certain streets in that city. The cause was tried to the court sitting without a jury.

It appears that the city council of Butte passed a resolution creating and defining the boundaries of improvement district No. 3, so called, and providing for paving, curbing and constructing the necessary catch-basins in the district. Notice was published in a newspaper, providing that the time for hearing objections to the final adoption of the resolution should be March 8, 1899, at the council chamber in the city of Butte, at the hour of 8 o'clock P. M. The complaint alleges that on the eighth day of March, 1899, at the council chamber in the city of Butte, at the hour of 8 o'clock P. M., the owners, including plaintiff, of property in the said improvement district No. 3, to the extent of more than one-half of the area of the property to be assessed to defray the expenses of the proposed improvements, objected to the making of said improvements, but that, notwithstanding the said objections, the council finally adopted the resolution and created the improvement district. This court held, on a former appeal (*Hensley v. City of Butte et al.*, 33 Mont. 206, 83 Pac. 481), that the complaint stated a cause of action for equitable relief by way of injunction, and remanded the cause to the district court for further proceedings.

Further proceedings being had in the court below, the record discloses that upon an issue made by the pleadings as to the sufficiency of the objections mentioned in the complaint, and whether they were presented to the council as provided by law, evidence was introduced to the effect that the objection was in writing and in words and figures as follows:

“Butte, Montana, March 4th, 1899.

“To the Honorable Mayor and City Council of the City of Butte, Montana—

“Gentlemen: The undersigned property owners of Butte, Montana, hereby respectfully object to and protest against im-

provements contemplated in improvement district No. 3, East Broadway from Wyoming street to Arizona street.

"Yours respectfully,

"Mrs. JULIA WEHRSPAUM,

"By WM. WEHRSPAUM.

"MICHAEL JETTE.

"LAVINA J. HENSLEY.

"LEVI CARTIER.

"J. H. LEYSON,

"Receiver A. J. Davis Estate.

"THE REALTY COMPANY OF MAINE,

"By J. E. RICKARDS CO., Agt.

"Mrs. MARY MacGINNISS,

"By JOHN MacGINNISS, Agt.

"JOHN NOYES,

"By W. McC. WHITE, Agt."

This so-called protest was delivered by the husband of one of the signers, to some one in the office of the city clerk, before the council meeting of March 8th, the person receiving the same declaring that it was sufficient for the purpose intended and would be presented to the council. On the evening of March 8th, at 8 o'clock, several, but not all, of the protestants were present in the council chamber, ready to be heard; but they testify that they were given no opportunity to do so. The so-called "protest" was on the clerk's desk, the mayor personally knew of its existence, but the council gave it no consideration. It appears that one alderman knew that such a paper had been signed, but there is no testimony that any other alderman knew of its existence, or that any member of the council knew that it was on the clerk's desk that night. Sharply at 8 o'clock the council was called to order, the mayor inquired if there were any objections to the resolution, and no one responded. Thereupon the resolution was finally passed, and this action results.

The district court found that the "objections to the improvement contemplated were not made by owners or agents,

combined, representing more than one-half in area of all the property which would be assessed to defray the cost of said improvements," and concluded that the plaintiff was not entitled to any relief. There was some testimony to the effect that the persons whose names were signed to the so-called "objection" did in fact own more than sixty per cent of the property which would be assessed to pay for said improvements. Some of the names subscribed to the paper were placed there by persons purporting to be the agents of the owners, and as to their authority to sign the same there is conflict of evidence.

Section 31 of House Bill No. 204 (Laws 1897, p. 219), authorizing the creation of special improvement districts in cities and towns, reads as follows: "Whenever it is desired to create a special improvement district for the purpose of grading, paving, curbing, macadamizing, constructing sidewalks, sewers, gutters, planting trees, or making any one or more of the improvements herein mentioned or other public improvements of a similar nature as provided in this chapter, and amendments thereof, the payments of assessments for which are to be made in installments, and are to extend over a period of three years, and the cost of which special improvement is to be paid for by special improvement warrants, the council by resolution, [shall] designate the number of such districts, describe the boundaries thereof, and state therein the character of the improvement or improvements which are to be made, an approximate estimate of the cost thereof, and the time when the council will hear objections to its final adoption; such resolution shall be published in a daily newspaper, published in the city or town, for at least five days, or in a weekly paper in one issue, not less than five days before the date set for hearing objections to the final adoption of the same. Any person or persons who are owners or agents of any lot or parcel of land within such improvement district shall have the right to appear at said meeting either in person or by counsel and show cause, if any there be, why the improvements mentioned therein shall not be made; if at such meeting, objections are made to the

making of such improvement, by owners or agents representing more than one-half in area of all the property which would be assessed to defray the cost of said improvement, the improvements shall not be made at that time, and at no time during a period of six months thereafter, but after the expiration of six months, a resolution providing for the same or similar improvements, covering the same territory may be considered after giving the same notice and taking the same proceedings as provided for in the consideration of the original resolution. If the owners or agents of property to the extent herein mentioned fail to make objections, a majority of all the members of the council voting in the affirmative will finally adopt the said resolution."

As we construe this section, it means that the owners or agents of all or any part of the property to be affected by the creation of the improvement district have an absolute right, at the time and place mentioned in the resolution, to appear before the council and be heard, either orally or by written protest or objection. If owners or agents representing more than one-half in area of all the property to be assessed object to the improvements being made, either orally or in writing, whether they assign any reason for the objection or not, the improvements shall not be made at that time. The owners or agents of fifty per cent or less of the area also have the right to appear and show cause why the improvements should not be made, and the council may or may not heed their objections. If, however, the representatives of more than fifty per cent appear and object, either in person or by agent or counsel, orally or in writing, the city or town council is powerless to proceed further.

Let us assume, for the moment, that these protestants represented more than fifty per cent of the area. Was their objection properly presented to the meeting of the council? We think not. The testimony shows that the protest was left at the city clerk's office, but it does not show that it was left with the clerk. Even though the clerk himself had received

it, we think that would not have been sufficient. Section 4784 of the Political Code defines generally the duties of the clerk. Presentation of protests, objections, or notices to the council seems to be no part of such duties. If there is any special ordinance of the city of Butte making it the duty of the clerk to present this objection, the plaintiff should have produced the same.

The legislature having provided that the council must receive objections and hear the protestants, we are clearly of opinion that a personal appearance must be made before that body by some one representing the owner of the property—either the owner himself, or his agent, or counsel for either. It is not necessary that each protestant should appear personally, but each must be represented, although they may all be represented by one person, if they so elect. Formal written objections may be presented, or cause may be shown in any other manner suited to the occasion. The objection in this case, not having been presented to the council as provided by section 31 of the Act, cannot avail the plaintiff.

There is nothing in the case of *McMillan v. City of Butte*, 30 Mont. 220, 76 Pac. 203, cited by appellant, in conflict with the views herein expressed. The court did not decide in that case that a mere filing with the clerk was sufficient.

The authorities cited by appellant's counsel, being cases where the city council is not empowered to act until petitioned to do so by a sufficient number of property owners, are not in point. Our statute gives the city the right to act, unless prevented from so doing by the owners of more than one-half in area of the property to be assessed.

For the reasons stated in this opinion, the judgment of the court below is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

RUMPING, RESPONDENT, v. RUMPING, APPELLANT.

(No. 2,440.)

(Submitted October 11, 1907. Decided October 21, 1907.)

[91 Pac. 1057.]

*Divorce—Pleading—Residence of Plaintiff—Jurisdiction—District Courts.***Divorce—Power of District Courts.**

1. The power to decree a divorce is purely statutory, and therefore courts have not any inherent power to dissolve marriage.

Same—Residence of Plaintiff—Complaint—Jurisdiction.

2. The fact that plaintiff in a suit for divorce has been a resident of the state for the statutory period of one year next preceding the commencement of the suit (Civ. Code, sec. 176) must be alleged in the complaint in order to confer jurisdiction of the cause upon the trial court.

Pleadings—Complaint—Jurisdiction—Appeal.

3. The objection that a complaint fails to allege a jurisdictional fact may be raised for the first time on appeal.

Divorce—Residence of Plaintiff—Complaint—Duty of District Courts.

4. In divorce proceedings district courts should, under the mandate of section 176 of the Civil Code, providing that a divorce *must not* be granted unless plaintiff has been a resident of the state for one year next preceding the commencement of the action, *ex officio* inquire into the fact of plaintiff's residence—jurisdictional in its nature—and be governed accordingly.

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

Surr by John H. Rumping against Eva Rumping. From a decree for plaintiff, defendant appeals. Reversed and remanded.

Mr. Edward Horsky, for Appellant.

Mr. O. F. Goddard, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

This is an action for divorce, appealed from the district court of Yellowstone county. The cause of action is based on the alleged desertion of the plaintiff by the defendant. The com-

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plaint fails to allege that the plaintiff has been a resident of this state for one year next preceding the commencement of the action, as required by section 176 of the Civil Code. The only pleading on the part of the defendant is an answer, in which she denies generally all of the allegations of the complaint, except those of marriage and birth of issue. The defendant failed to appear at the trial. Evidence was offered by the plaintiff, whereupon the court found all of the allegations of the complaint to be true and entered a decree dissolving the marriage. Defendant appeals.

The cause was presented to this court without argument, and we have received no assistance from the briefs of counsel; the appellant submitting the bald statement that the judgment should be reversed, and the respondent contending that it should be affirmed. The question involved is a new one in this jurisdiction, and not as easy of decision as the failure of counsel to examine the same would seem to indicate. It is also an interesting one from a lawyer's standpoint.

Section 176 of the Civil Code, *supra*, reads as follows: "A divorce must not be granted unless the plaintiff has been a resident of the state for one year next preceding the commencement of the action." If the allegation of plaintiff's residence is jurisdictional in its nature, the objection can, of course, be urged for the first time in this court.

Our research has discovered the case of *Dutcher v. Dutcher*, 39 Wis. 651, which appears to be authority for the action of the trial court in holding that the pleadings do not raise the issue of plaintiff's residence. The opinion is by Chief Justice Ryan, and for that reason is entitled to the respectful consideration of courts, and, viewed in the light of the rules of both common-law and code pleading, seems unanswerable on that point. The divorce statute of Wisconsin at the time read as follows: "No divorce shall be granted unless the petitioner or plaintiff shall have resided in this state one year immediately preceding the time of exhibiting the petition or complaint," etc. (Wis. Rev. Stats. 1858, Chap. 111, sec. 12.) The court said: "But the ques-

tion remains whether the pleadings raise the issue of her [plaintiff's] residence. Her want of residence under the statute is clearly a personal disability, not affecting the present right of action, but only the present right to prosecute the action, a disability which might be cured; clearly matter of abatement, not of bar." Story's Equity Pleading, section 708, is then quoted as follows: "All declinatory and dilatory pleas in equity are properly pleas, if not in abatement, at least in the nature of pleas in abatement, and therefore, in general, the objections founded thereon must be taken *ante litem contestatam* by plea, and are not available by way of answer, or at the hearing"; and 1 Chitty's Pleading, 446, as follows: "Whenever the subject matter of the defense is that the plaintiff cannot maintain any action, at any time, whether present or future, in respect of the supposed cause of action, it may and usually must be pleaded in bar; but matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should in general be pleaded in abatement." The court then proceeds: "So Lord Redesdale distinguishes pleas 'that the plaintiff is not entitled to sue by reason of some personal disability,' and that 'the plaintiff has no interest in the subject, or no right to institute a suit concerning it,' from pleas in bar, and calls them pleas to the person of the plaintiff. And the distinction is not one of form merely, but of substance; for generally judgment for the defendant on pleas in abatement abates the action only; on plea in bar, bars the cause of action everywhere and forever. In the present case judgment against the respondent for want of residence within the statute should not operate to bar another action here, if she should have acquired a residence, or elsewhere, at any time or under any circumstances. * * * If certain matters in abatement are apparent in the complaint, they are ground for demurrer under the Code. But if matter in abatement, not apparent in the complaint, be relied on as a defense, it must be specially pleaded in the answer. A general denial is a plea in bar, not broader at least than the general issue at common law, and cannot raise

any defense by way of abatement. * * * Judgment for the defendant upon a general denial is a general judgment—a bar to all future actions for the same cause. And it would be a cruel abuse that it should go upon a defense in abatement concealed in *gremio*. The Code intended no such perversion of justice. And it is well settled in this court that matter in abatement, not apparent in the complaint, must, like other special defenses, be specially pleaded in the answer. * * * The appellant contends that the defense here is in the nature of a plea to the jurisdiction. We do not think so, but need not discuss the point; for, by all the authorities, the rule equally applies to pleas to the jurisdiction, which, if not strictly pleas in abatement, are in the nature of pleas in abatement. * * * The defense, therefore, that the respondent was not a resident of the state, though well founded in fact, was inadmissible under the pleadings in this case.”

However, notwithstanding the foregoing conclusion, the court reversed the judgment on grounds of public policy, saying, among other things: “It concerns the public welfare that the state should not be made a free mart of divorce for strangers, and that, amongst her own people, divorce should not become matter of free will as much as marriage—a personal right independent of public right and inconsistent with public welfare. Divorces without the letter and spirit of the statute in fact, but made to look within it by design or mistake or accident, are frauds upon the statute and offenses against public policy. And it is the duty of the courts *ex officio* to look closely into actions for divorce, and to direct inquiries into the facts, when necessary, and finally to deny all divorces which would be abuses of the statute.” If we found it requisite, in order to protect the interests of the state, to reverse this case on grounds of public policy, it would not be necessary to go beyond the decision of this court in the case of *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6, where the subject is reviewed very thoroughly in an opinion by the present Chief Justice.

There is, however, in the books another line of cases, which hold that a failure to allege and prove the residence of the plaintiff within the statute renders the decree a mere nullity, for the reason that the court has no power to grant a divorce unless this provision of the statute is complied with. We are inclined to think this the better and more satisfactory line of authorities upon which to rest our judgment, and to hold that statutes such as ours were designed to and do abrogate any rule of pleading in conflict with the statutory prohibition. It is elementary, of course, that neither courts of law or equity have any inherent power to dissolve marriage. The power to decree a divorce is purely statutory. (*Irwin v. Irwin*, 3 Okla. 186, 41 Pac. 369.) When, therefore, the legislature, in conferring upon courts the jurisdiction to grant divorces, says, in the same statute, that a divorce *must not* be granted unless the plaintiff has been a resident of the state for one year next preceding the commencement of the action, we believe it meant just what it said, and that trial courts, as Chief Justice Ryan remarked, should *ex officio* inquire into the jurisdictional facts, and be governed accordingly.

In *Gredler v. Gredler*, 36 Fla. 372, 18 South. 762, the court said: "The complainant had wholly failed to allege in his bill, or to prove, that he had resided in this state for two years prior to the exhibition of his bill. * * * The fact of the applicant's prior residence for two years in this state was necessary both to be alleged in the bill and established by proof, before the courts were authorized to grant a divorce under our statute."

The supreme court of California, in *Bennett v. Bennett*, 28 Cal. 600, used this language: "But over and beyond this, residence is palpably within the mischiefs against which it was the object of the statute to guard, and therefore it must be proved. Should the judgment in this case be affirmed, the affirmance would be but a letter of invitation to the married, domiciled abroad, who have, with or without reason, become emulous of divorce, to take a trip, one, or both, to this state

for the purpose of avoiding delays, or yet more serious impediments at home, with the intention to return thereto as soon as the purpose of their coming shall have been hurried to accomplishment by the aid of an accommodation answer admitting the averment of a six months' residence on the part of the applicant. Against this prostitution of the judicial power, the statute interposes the only available barrier by requiring, as we construe it, not only that the causes of divorce should be proved to the court, but the residence of the applicant also, as the sole ground on which it can take cognizance of the question."

In *Powell v. Powell*, 53 Ind. 513, it was held that, where the residence of the petitioner was not proved as required by the statute, the court had no power to decree a divorce.

Under a statute very similar in its phraseology to our own, the supreme court of Minnesota held, in *Thelen v. Thelen*, 75 Minn. 433, 78 N. W. 108, that the fact of the plaintiff's residence was jurisdictional, and must be alleged in the complaint.

In *Luce v. Luce*, 15 Wash. 608, 47 Pac. 21, the plaintiff was unable to prove his residence for the statutory period of time, and the court held that he had failed to prove a fact necessary to entitle him to any relief.

The supreme court of Texas, in *Haymond v. Haymond*, 74 Tex. 414, 12 S. W. 90, said: "When the facts required to exist by our statutes are not established by the evidence, a decree of divorce should be refused." (See, also, *Pearce v. Pearce*, 132 Ala. 221, 90 Am. St. Rep. 901, 31 South. 85; *Johnson v. Johnson*, 95 Mo. App. 329, 68 S. W. 971; *Hopkins v. Hopkins*, 35 N. H. 474; 14 Cyc. 663.)

The decree entered in this case by the district court of Yellowstone county is reversed, and the cause remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

STREICHER ET AL., APPELLANTS, v. MURRAY, RESPONDENT.

(No. 2,435.)

(Submitted October 9, 1907. Decided October 25, 1907.)

[92 Pac. 36.]

Equity—Deeds—Cancellation—Fraud—Trial—Motion for Judgment—Nonsuit—Findings—Review—Laches.**Suits in Equity—Motion for Judgment—Inferences Drawn from Evidence—Findings—Review.**

1. Plaintiff, upon motion by defendant for judgment, made at the close of plaintiff's case in an equity suit, is not entitled—as he would be on a motion for nonsuit in an action at law—to have every inference drawn in his favor from the evidence which may reasonably be drawn therefrom; but the whole of the evidence is submitted to the court for final judgment, and if it furnishes ground for different inferences, the finding of the court thereon will not be disturbed unless the evidence preponderates against it.

Equity—Deeds—Cancellation—Fraud—Laches.

2. Plaintiffs, in a suit to set aside a deed to mining property on the ground of fraud, were subjects of the German empire and resided there. In 1892 they executed and delivered, through a duly authorized agent, a deed to the property in question. In 1894 they were informed that fraud had been practiced in the transaction, and commenced suit in 1897, which, however, was not brought to trial until 1906, plaintiffs' only excuse for the delay being that, as residents of a foreign country and ignorant of the English language and the institutions of this country, it was difficult for them to obtain the necessary facts to support their action. The testimony of the principal witnesses, with the exception of one whose testimony could, however, have been readily supplied by others, was obtainable at any time. *Held*, that plaintiffs' right to relief was barred by laches in prosecuting their suit.

Same—Laches in Prosecuting Action.

3. One desiring to rescind a contract on the ground of fraud is not relieved of the imputation of laches by the mere bringing of his action promptly, if thereafter he neglects to prosecute it with diligence.

Same—Laches—Striking Competent Testimony—When Harmless.

4. Where the district court correctly found that plaintiffs' cause of action in a suit for the cancellation of a deed to mining property, on the ground of fraud, was barred by laches, alleged error in striking out competent and material testimony which tended to support a charge of conspiracy to defraud, will not be considered.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

SUIT by Ludwig Streicher and others against James A. Murray. From a judgment for defendant, plaintiffs appeal. Affirmed.

Mr. M. J. Cavanaugh, Mr. Chas. Mattison, and Mr. J. A. Poore, for Appellants.

Where a person is accused of collusion, conspiracy or fraud, it is competent to show that he has presented the same scheme to others. (*People v. Arnold*, 46 Mich. 268, 9 N. W. 406; *Reinhold v. State*, 130 Ind. 467, 30 N. E. 306.)

The question of whether proof of conspiracy, collusion or fraud shall precede evidence of acts or declarations of the parties is a question merely of the order of proof, and is in the discretion of the court. (*People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678.) In order to make the declaration of one co-conspirator admissible against the other, it is not necessary that the conspiracy be established conclusively by other testimony. If such were the case it would be unnecessary to introduce any evidence of such acts or declarations, for the conspiracy would have already been proven without them. It is enough that there is some evidence of collusion, fraud or conspiracy. (*Doll v. Wooldredge*, 142 Mass. 161, 7 N. E. 832; *State v. Mushrush*, 97 Iowa, 444, 66 N. W. 746; *Pacific Live Stock Co. v. Gentry*, 38 Or. 275, 61 Pac. 422, 65 Pac. 597; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 31; *Rea v. Missouri*, 17 Wall. (U. S.) 532, 21 L. Ed. 707.)

Where the incidents accompanying a transaction are inequitable, and show bad faith, such as concealment, misrepresentations, undue advantage, oppression, ignorance of facts, weakness of mind, sickness, old age, incapacity or the like, these circumstances, joined with inadequacy of price, or any of them, may easily induce the court to grant relief, defensive or affirmative. Such circumstances operate to throw a heavy burden of proof upon the party seeking to sustain the transaction, or claiming the benefits of it, to show that the other acted voluntarily, knowingly, intentionally and deliberately, with full knowledge of the nature and effect of his act, and that his consent was not obtained by any oppression, undue influence, or advantage taken of his condition, situation or necessities. If the defendant

should show perfect good faith in the transaction, it would be sustained. If he should fail in this, equity should grant such relief, affirmative or defensive, as might be appropriate. (2 Pomeroy's Equity Jurisprudence, p. 432, sec. 828, note; *Fish v. Lesser*, 69 Ill. 394; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264, 8 L. Ed. 120; *Byers v. Surget*, 19 How. (U. S.) 303, 15 L. Ed. 670; *Malloy v. Berkin*, 11 Mont. 138, 27 Pac. 446.)

In every transaction between persons in a fiduciary capacity, equity raises the presumption against its validity, and casts upon the party acting in such relation the burden of proving affirmatively its compliance with the equitable requisites. (2 Pomeroy's Equity Jurisprudence, p. 478, sec. 956; see, also, *Savage v. Savage*, 12 Or. 459, 8 Pac. 754; *Ferguson v. Dent*, 24 Fed. 412; *Schoelkopf v. Leonard*, 8 Colo. 159, 6 Pac. 209; *Fry v. Platt*, 32 Kan. 62, 3 Pac. 781.)

An agent employed to make a sale must make full and fair disclosures of all facts within his knowledge as to the propriety of the sale, and where property has been transferred by an agent contrary to instructions or duty the principal may recover it from a third party. (Am. & Eng. Ency. of Law, 2d ed., p. 1172; *Warner v. Martin*, 11 How. (U. S.) 224, 13 L. Ed. 667; *Hill v. Colridge*, 33 Ark. 626; *Thatcher v. Kaucher*, 2 Colo. 698; *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289; *Western Trans. Co. v. Marshal*, 37 Barb. 509; *McMahon v. Sloan*, 12 Pa. 229, 51 Am. Dec. 601; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Ingle v. Hartman*, 37 Iowa, 274; *Stoner v. Wiser*, 24 Iowa, 435; *Moseley v. Buck*, 3 Munf. (Va.) 232, 5 Am. Dec. 508; *Savage v. Savage*, 12 Or. 459, 8 Pac. 754; *City of Findley v. Pertz*, 66 Fed. 434, 13 C. C. A. 559, 29 L. R. A. 188; *Keith v. Kellam*, 35 Fed. 244; *Norris v. Tayloe et al.*, 39 Ill. 17.) Purchasers from an agent with knowledge of the facts stand in no better position than the agent himself, and hold as trustee for the principal. (*Louisville Bank v. Gray*, 84 Ky. 565, 2 S. W. 168; *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553.) A third party dealing with an agent knowing at the same time that he was acting for the other party is a party

to the fraud for which he may be liable. (Clark & Skiles on Agency, p. 1199, sec. 553.) The principal's rights in such case depend upon the state of the transaction at the time he discovers the fraud and acts thereon. (Clark & Skiles on Agency, p. 1200.) If it is executed wholly or in part, and the rights of innocent parties have not intervened, the principal may rescind the contract, and by restoring whatever he has received, recover back the right or property he had parted with under the contract, even though the agent does not act corruptly, or there is no actual intention to defraud the principal. (*Panama etc. Tel. Co. v. Indian Rubber G. P. & Tel. Co.*, 10 Ch. App. 515; *City of Findlay v. Pertz*, 66 Fed. 427, 13 C. C. A. 559, 29 L. R. A. 188; *Miller v. Louisville M. Ry. Co.*, 83 Ala. 274, 3 Am. St. Rep. 722; *Norris v. Taylor*, 49 Ill. 17, 95 Am. Dec. 568; *Eldridge v. Walker*, 60 Ill. 230; *Hegenmyer v. Marks*, 37 Minn. 6, 5 Am. St. Rep. 808, 32 N. W. 785; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Green v. Haskell*, 5 R. I. 447; *Fish v. Lesser*, 69 Ill. 394.)

It was not necessary to offer to return to the defendant the \$8,000 received by plaintiffs on sale, or any other sum. Where the purchaser is alleged to have in his hands more than sufficient money of the plaintiffs to reimburse him for the purchase price, and an accounting is asked, this is a sufficient offer to rescind. (*Watts v. White*, 13 Cal. 324; *Maloy v. Berkin*, 11 Mont. 138, 27 Pac. 442.)

The burden of proving plaintiff's knowledge of the facts giving rise to his right of relief, and of proving the time when he acquired this knowledge so as to show acquiescence is upon the defendant. (*Baker v. Lever*, 67 N. Y. 304, 23 Am. Rep. 117; *Baker v. Spencer*, 47 N. Y. 562; *Engeman v. Taylor*, 46 W. V. 669, 33 S. E. 922.)

The general doctrine of laches is not applicable in this action. (See *Nud v. Powers*, 136 Mass. 273; *Mott v. Mares* (Tex. Civ. App.), 29 S. W. 825; *Hamilton v. Dooley*, 15 Utah, 280, 49 Pac. 769; *Townsend v. Vanderwerker*, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383; *Richardson v. Green*, 61 Fed. 432, 9

C. C. A. 565; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Ridgley v. Tacoma Light Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425.) Where the delay is not sufficient to bar the legal remedy, equity should not bar the remedy for laches, except there has been great prejudice to the defendant. (*McDermott v. Anaheim Water Co.*, 124 Cal. 112, 56 Pac. 779; *First National Bank v. Nelson*, 106 Ala. 535, 18 South. 154.)

Mr. J. E. Murray, and *Mr. J. L. Wines*, for Respondent.

Actual, as distinguished from constructive, fraud is the character of fraud relied upon in this case; no act is shown to have been committed by defendant with any intent to defraud. No fraud, false representation, concealment, or conspiracy are alleged as against defendant. The allegation of fraud is a mere legal conclusion and wholly insufficient to put the court upon inquiry as to its effect if it had been properly pleaded. (*Savage v. Burns*, 3 Mont. 27; *Misner v. Knapp*, 13 Or. 135, 57 Am. Rep. 6, 9 Pac. 65; *Kent v. Snyder*, 30 Cal. 667; *Semple v. Hager*, 27 Cal. 163; *Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162, 21 Pac. 984, 4 L. R. A. 826.) The complaint must show that plaintiffs were misled by something that was done by defendant or his grantor. (*Nicolai v. Lyon*, 8 Or. 56.) A party selling real property is conclusively presumed to know the state of his own title. The attorney in fact of plaintiffs, also, in this case, is conclusively presumed to know the state of the title. (*Robins v. Hope*, 57 Cal. 493.)

The complaint must show that the attorney in fact executing the deed was induced by, and relied upon, statements made by the purchaser, and that such statements were false, and that they were made for the purpose of inducing such sale, and with that intent, and that they were known to be false; and it must also be shown that the agent believed the representations to be true and acted upon the faith of the same. (*Taylor v. Guest*, 58 N. Y. 262-266; *Meyer v. Amidon*, 45 N. Y. 169; *Oberlander v. Spiess*, 45 N. Y. 175-177.) The circumstances of the discovery of facts and conditions must be fully stated and proved,

and the delay which has occurred must be shown to be consistent with reasonable diligence. (*Wood v. Carpenter*, 101 U. S. 135, 140, 25 L. Ed. 807; *Hardt v. Heidweyer*, 152 U. S. 547, 14 Sup. Ct. 671, 38 L. Ed. 548; *Badger v. Badger*, 2 Wall. 87, 17 L. Ed. 836; *Robertson v. Burrel*, 110 Cal. 568, 42 Pac. 1086; *Lakin v. Sierra Butte M. Co.*, 25 Fed. 337; *Bratt v. Cal. M. Co.*, 9 Saw. 354, 24 Fed. 869; *Hagerman v. Bates*, 24 Colo. 71, 49 Pac. 139; *Woodmanse Mfg. Co. v. Williams*, 68 Fed. 489, 15 C. C. A. 520; *Murphy v. DeFrance*, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861; *Godden v. Kimmell*, 99 U. S. 201, 25 L. Ed. 431.)

In this case, the complaint fails to show any excuse for not instituting this action prior to the time when five years had elapsed after the preparation of the alleged fraud and the execution of the deed in question. (*Hammond v. Wallace*, 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837; *Burkle v. Levy*, 70 Cal. 250, 11 Pac. 643; *Williams v. Mitchell*, 87 Cal. 532, 26 Pac. 632; *Credit Company v. A. C. R. Co.*, 15 Fed. 46, 5 McCrary, 23; *Cotter v. Butte & Ruby Valley Co.*, 31 Mont. 134, 77 Pac. 509.)

To invalidate a sale tangible facts must be proven from which a legitimate inference of a fraudulent intent can be drawn. It is not enough to create a suspicion of a wrong, nor should the court be required to guess at the truth. (*Jaeger v. Kelly*, 52 N. Y. 274.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by certain of the plaintiffs to obtain a decree setting aside a conveyance made by them and others to the defendant, through his agent, Silas F. King, of interests in mining claims described in the complaint and situate in Silver Bow county, and requiring the defendant to account for ores extracted therefrom since the conveyance was made. Recovery is also sought of certain moneys, which, it is alleged, belong to plaintiffs, but which the defendant, having wrongfully obtained, has converted to his own use. Others of the plaintiffs who joined in the execution of the deed having brought another ac-

tion demanding the same relief on the same grounds, the two causes were consolidated and tried as one.

The allegations upon which relief is demanded are set forth in plaintiffs' pleadings with much prolixity and repetition. The substance of them is the following: That plaintiffs are all subjects of the German Empire and reside there; that one John Streicher died intestate in Silver Bow county in 1882, and plaintiffs, his heirs at law, having inherited the property in controversy as tenants in common, were the owners of it until about August 1, 1892; that they knew nothing of its value or condition beyond the fact that it consisted of patented mining claims, and that they were tenants in common with others who had undivided interests therein, living in Silver Bow county; that upon the death of said Streicher they appointed one Adolph Rosenthal, acting consul for the German Empire at San Francisco, California, their agent and attorney to take charge of the property and manage it for them, and that he accepted the trust; that said Rosenthal thereupon employed one William Lowey, an attorney at law at San Francisco, to protect the interests of the plaintiffs; that he acted as the attorney of Rosenthal in this capacity until 1891, when he became associated with one Gutsch, whereupon and afterward the firm of Lowey & Gutsch assumed charge of the property; that soon after his employment the said Lowey secured the services of one Caleb Irvine, residing at Butte, to lease the property and collect accruing royalties and rents for the benefit of the plaintiffs; that upon the death of Irvine, in 1891, Lowey & Gutsch employed one Gustav A. Kornberg, a resident of Butte, to act as their agent to lease the property, to collect rents and royalties for the use and benefit of the plaintiffs, and also to secure a purchaser therefor; that at that time Lowey & Gutsch knew that plaintiffs' title was perfect, and that the property was very valuable and was yielding large dividends in royalties; that Lowey & Gutsch and Kornberg thereupon entered into a conspiracy to defraud the plaintiffs by procuring a purchaser from Rosenthal, plaintiff's agent at a grossly inadequate price; that

Kornberg was at that time, and for a long time prior thereto had been, the trusted agent of the defendant in mining business in Silver Bow county and an intimate, confidential friend; that the defendant joined the conspiracy, at the instance of Kornberg, to cheat and defraud the plaintiffs; that Kornberg, at the instance and request of defendant, went to San Francisco during the winter of 1891, at the expense of defendant, to bring about the sale through the aid of Gutsch; that defendant and Kornberg then knew from a personal examination of the property that one of the claims in particular (the Elba) was paying large dividends and contained a large amount of merchantable ore; that between the time of the death of Irvine in 1891, and August, 1892, there had been deposited by leasers of the Elba claim, in the banking-house of W. A. Clark & Bro., at Butte, for the use and benefit of the plaintiffs, in the way of royalties, the sum of \$2,000, the stipulated rate paid by the leasers being twenty-five per cent of the ores extracted; that the defendant and Kornberg both well knew that the interests in the various claims held and owned by the plaintiffs had a value of \$100,000, and that the Elba claim had yielded during the preceding year a profit of more than \$10,000; that they also well knew that the plaintiffs were all foreigners, living in Germany, and were ignorant of the laws and language of the people in Montana, and had no means of learning or knowing the condition or value of their property, except through such information as might be given them by their agent Rosenthal. and that he had no means of knowledge except through the agency of Lowey & Gutsch, Kornberg, and the defendant; that, in pursuance of their conspiracy, the defendant, Kornberg and Gutsch concealed from the plaintiffs, and their agent, Rosenthal, the condition and value of the property—not only so, but that Kornberg, at the instance of the defendant and through Gutsch, represented to Rosenthal that plaintiff's title was questionable, that the property was of little value, that Kornberg had repeatedly offered it for sale, but had found no purchasers, that other persons were in possession, that it was located a

thousand miles from San Francisco, in Montana, where titles were insecure, and that he had a purchaser, but one who would not buy if the sale was not quickly consummated; that all these representations were false, were made by Kornberg intentionally with the purpose of inducing the plaintiffs and their agent, Rosenthal, to act upon them and part with title for a grossly inadequate price; that during the negotiations Kornberg pretended to act for the plaintiffs and their agent, Rosenthal, but was in fact acting for the defendant; that this fact was not known to plaintiffs or Rosenthal until after the deed had been executed conveying the property and also the money deposited with W. A. Clark & Bro.; that plaintiffs and their agent, Rosenthal, having no knowledge of the value of their property, believed and relied upon these representations of Kornberg and Gutsch; that otherwise the plaintiffs would not have parted with their title; that they had no knowledge of the deposit of money with W. A. Clark & Bro., because the fact was concealed from them by Kornberg and Gutsch; that one Silas F. King was the ostensible purchaser, but that the defendant was in fact the real purchaser, said Kornberg acting simply as his agent; that the deed executed by Rosenthal in plaintiffs' behalf was prepared in Butte, Montana, at the instance of the defendant; that it, in terms, conveyed all the property, including all moneys belonging to plaintiffs or claims in their favor in Silver Bow county, for a consideration of \$8,000; that it was sent to San Francisco for execution by Rosenthal, and was then put in escrow for delivery to King upon payment of said sum of \$8,000 within ninety days thereafter; that Gutsch had then written to plaintiffs making the false representations heretofore enumerated, adding to them a false statement that the mining property was in the possession of other persons, from whom it would be difficult to recover it, and that they would do well to get what they could out of it by making the sale to King; that, acting upon these representations, the deed was executed by Rosenthal and put in escrow in the name of King, but in fact for the defendant, and that thereafter the defendant paid the sum

of \$8,000, receiving the deed; that defendant thereupon had King deed the property to him and collected the money from W. A. Clark & Bro., and now, being in possession and control of the property, claims to be the exclusive owner of it; that upon presenting the deed to Rosenthal for execution, Gutsch would not allow him time to communicate with plaintiffs, but induced him to execute it at once, upon the false representation, which Rosenthal believed, that he must act at once or lose the opportunity to sell; that Kornberg received from the plaintiffs a commission of \$500 for his services in selling the property, and at the same time received \$5,000 from the defendant for negotiating the sale; that since August, 1892, the defendant, being unlawfully in possession of the property, has extracted ore therefrom of the value of \$250,000 and converted the same to his own use; that the first information the plaintiffs had after the execution of the deed that the representations made to them and their agent were false, and that they had been defrauded thereby, was in the latter part of the year 1894; that as soon as they could thereafter ascertain the facts this action was instituted, and that their delay in bringing the action was due to the distance of their residence from the state of Montana, the difficulty of ascertaining the facts by correspondence, and their ignorance of American institutions and the English language.

The complaint contains no allegation that the plaintiffs offered to rescind the sale prior to bringing suit; the allegation on this subject being that the plaintiffs are willing that the defendant shall retain out of the amount of money found to be due them from him for ores extracted by him and the moneys received by him, the amount paid to the plaintiffs as a consideration for the deed. It is demanded that the conveyance be adjudged to be fraudulent, that it be canceled of record, that plaintiffs be declared to be the owners of the property and the money held by Clark & Bro. at the time of the delivery of the deed, that the amount of ore extracted since 1892 be ascertained, and that plaintiffs have judgment for such amount and for the

amount of money taken from the bank of W. A. Clark & Bro., with legal interest on both sums, and for general relief.

The answer of the defendant admits that he paid to Rosenthal, the agent of plaintiffs, the sum of \$8,000, the consideration agreed to be paid for the property, that thereupon King received the deed; that thereafter King conveyed the property to him, that defendant has since been in the possession of it, and that he has received therefrom in royalties the sum of \$11,000, but no more. He denies generally and specifically all the other allegations of the complaint. Among other matters pleaded as affirmative defenses, the defendant relies upon the laches of plaintiffs and the statutes of limitation.

The trial was had by the court sitting without a jury. At the close of plaintiffs' case, the testimony of two witnesses, Schmidt and Kosanko, was, on motion of defendant, stricken from the record as incompetent. Thereupon the defendant moved for judgment, specifying the particulars in which the evidence failed to support the allegations of conspiracy, fraud, and inadequacy of consideration, and alleging that it showed inexcusable laches on the part of plaintiffs in seeking a rescission of the sale. This motion was granted, and judgment entered for the defendant for costs. The plaintiffs have appealed from the judgment and an order denying a new trial.

It is argued that the court erred in striking out the testimony of witnesses Schmidt and Kosanko, and in sustaining defendant's motion for judgment. We shall discuss these contentions in a reverse order from that pursued in appellants' brief.

The motion for judgment is designated by counsel as a motion for nonsuit. It is argued that, if there is any evidence in the record justifying an inference of fraud and conspiracy on the part of defendant with Kornberg and Gutsch, the court was not justified in rendering judgment for defendant. In an equity case, however, there can be no such thing, technically, as a nonsuit. (*Sanford v. Gates, Townsend & Co.*, 21 Mont. 277, 53 Pac. 749; *Short v. Estey*, 33 Mont. 261, 83 Pac. 479; *Morrison v. Jones*, 31 Mont. 154, 77 Pac. 507.) Upon motion

for judgment the plaintiff is not entitled, as in a suit at law, to have every inference drawn from the evidence which may reasonably be drawn therefrom in his favor. The whole of the evidence is submitted to the court for final judgment, and if it furnishes ground for different inferences the finding of the court thereon will not be disturbed, unless, as in a case where evidence has been introduced by the defendant also, it preponderates against the finding. (*Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918.)

The evidence submitted in this record is in some respects extremely vague and unsatisfactory, and in others conflicting. The case presented, therefore, is not one upon the facts from which the court was left to determine solely whether or not there was an inference favorable to plaintiffs, but rather one upon which it was left to find from conflicting evidence whether the allegations of the complaint were sustained.

After an examination of the somewhat voluminous record, we are of the opinion that the judgment and order should be affirmed. There is no substantial evidence of any wrongdoing on the part of the defendant Murray, even though it be conceded that Kornberg betrayed his trust. It appears that, ever after the plaintiffs inherited the property from John Streicher, they had been anxious to sell it. Prior to the time Kornberg effected a sale of it, they had authorized an offer of it to be made for \$7,000. They knew that all the claims but one, the Elba, had not been developed, and that even that, under the management of their agent Irvine, had yielded them no royalties, and they had stated to their agent that they preferred to sell it and get what they could out of it. Indeed, they had supposed,—which was the fact prior to 1891,—that the property had little apparent value. They had also complained that Rosenthal, their agent, and Lowey & Gutsch, had been negligent in failing to secure a purchaser. It seems that some royalties had been paid by leasers to Irvine, but that he had failed to account for them. In 1891, when Irvine died, Rosenthal and Gutsch,

Lowey being then absent in Europe, made inquiry of a number of persons in Butte for some suitable person to act as agent to sell the property as soon as might be. Kornberg having been recommended to them, they secured his services for that purpose. He was authorized to sell, and the price was fixed at \$7,000 net, he to receive as his commission one-half of what he could get above that amount. In case he failed to obtain more than \$7,000, he was to receive no commission. Leasers were then at work on the Elba claim, and were taking out some ore. After having offered the property to different persons who were regarded as available purchasers, and having failed to find a purchaser, he offered it to defendant, first for \$20,000, then for \$15,000, and finally for \$8,000. The defendant at first declined to purchase at all, but later, after examination of it, accepted the offer. The deed was then executed to King at the defendant's request by Rosenthal, and deposited in a bank in San Francisco, to be delivered within ninety days upon payment of \$8,000. This was in April, 1892. It contained a provision setting over to the purchaser all moneys due to the plaintiffs for royalties. After Irvine's death, and prior to the appointment of Kornberg, the royalties due from leasers had been deposited in the bank of W. A. Clark & Bro., at Butte, but at whose direction it does not appear. Kornberg, under the terms of his employment, seems to have had no control of these, nor was he under any obligation to see that they were paid over to the plaintiffs. They continued to accumulate until the purchase price was paid and the deed delivered. This occurred on July 22, 1892. The accumulated royalties then amounted to about \$2,200. Kornberg knew that some amount of money belonging to the heirs was on deposit at the time the deed was executed, but the exact amount he did not know, because information had been denied him at the bank. This knowledge he communicated to Murray. Whether he communicated definite knowledge on this point to Lowey & Gutsch does not appear. He had no communication with Rosenthal, so far as the record shows. The latter seems to have thought the amount of these royalties,

if there was any amount, was trifling. There is no evidence, however, that he had definite knowledge on the subject. There is no evidence that Murray knew, or had reason to think, that Kornberg concealed any material fact from Lowey & Gutsch, or that he made any misrepresentations to them or the plaintiffs.

The deed from plaintiffs to King is not in the record, and it is impossible to tell therefore what its contents are. Nor does the evidence contain any explanation or reason why the clause was inserted in it, providing that Murray should have the royalties due to plaintiffs at the time the deed was delivered. There is a suggestion, however, that they were set over to Murray for the purpose of being paid out to two or three other of the heirs of Streicher living in the United States, who had not joined in the deed with plaintiffs. In any event, the evidence is clear that at least \$1,000 of the amount was paid out to secure one interest. So far as appears, it may have been understood between Murray and Kornberg, the agent of plaintiffs, that, since most of these royalties had accumulated after the deed had been put in escrow in San Francisco, they should belong to Murray.

It is not entirely clear from the evidence, either, that the consideration agreed to be paid and finally paid by Murray, was grossly inadequate, if the value of the property at the time the agreement was made be taken into consideration; for, while there is some vague evidence tending to show that the interest of plaintiffs might at that time have been worth \$20,000, it is clear that it was not so regarded generally by mining people who lived at Butte and whose attention was called to it. None of the claims, except the Elba, were developed so as to be producing mines. The Elba had never produced any large amount up to that time. At least, the evidence fails to show that it had. Apparently it was just beginning to produce, and, as it turned out, after the contract was made and the deed delivered, it produced rapidly for a few months, and then ceased to be worked, and has not been worked since.

In saying what we have said so far, we have not taken into consideration the delay of the plaintiffs in bringing this

action, and their lack of diligence in prosecuting it. The deed was put in escrow in April, 1892. It was delivered on July 22, 1892. The evidence shows that the plaintiffs were informed in 1894, by correspondence with persons in Butte, that there were suspicious circumstances connected with the transaction,—in other words, that they had been defrauded. The action was brought on April 27, 1897. It was then allowed to sleep, apparently, until it was finally brought to trial on August 6, 1906, more than nine years afterward. Assuming that there is sufficient excuse for not bringing the action earlier, for that the plaintiffs were ignorant of the language and institutions of this country, that they resided in Germany, and that it was difficult to obtain the facts necessary to support the action, what shall we say of the unexplained delay of more than nine years after it was brought?

One desiring to rescind a contract on the ground of fraud or for any other reason must act promptly. (Civ. Code, sec. 2273.) If he must bring an action to compel a rescission, he must bring it promptly, and, not only that, but he must prosecute it with diligence. The mere bringing of an action does not relieve a person from the imputation of laches. The lack of diligence in prosecuting it after it is brought leads to the same consequences as delay in bringing it. Witnesses die or disappear, or the facts fade from memory. The positions of the parties change, or the subject of the controversy fluctuates in value. The right sought to be enforced becomes doubtful or uncertain, or it becomes impossible for the court to administer equity between the parties with any degree of certainty. In all such cases the court will, in its discretion, refuse to entertain the action and leave the parties as they are. (*Johnston v. Standard Min. Co.*, 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480; *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. 176, 41 L. Ed. 531; 18 Am. & Eng. Ency. of Law, 2d ed., 110, and collection of cases in note.)

Each case must rest upon its own facts, but we think the excuse offered for the delay in bringing the action, and then al-

lowing it to rest without prosecution for more than nine years, is not justified by the reasons assigned either in the pleadings or in the evidence. Indeed, the evidence fails to offer any substantial reason why the trial was not had sooner. It is scarcely possible to conceive that it was necessary to occupy more than nine years in gathering the facts upon which the plaintiffs have sought to sustain their claim.

The main volume of the evidence presented consisted of the testimony of the defendant, Kornberg, Gutsch, and Rosenthal. The principal witness, other than these, was one Sinsel, who was engaged in working the Elba claim at the time the sale was made. The testimony of all of these witnesses, except that of Sinsel, could have been had at any time. The testimony given by Sinsel could have been supplied largely, doubtless, by many witnesses who were living in Butte, for it went almost entirely to the value of the Elba claim. At any rate, it is scarcely possible to conceive that a person making diligent inquiry could not have ascertained his whereabouts in less time than nine years.

Viewing the evidence as a whole, without analyzing it further, we are of the opinion that it does not preponderate against the finding of the court, so as to justify this court in reversing the judgment and directing a new trial. Even if it would otherwise justify the granting of the relief sought, we think the district court was justified in denying the relief on the ground of laches.

The conclusion having been reached that the laches of plaintiffs precludes a recovery in any event, it is not necessary to consider the question whether the court erred in striking out the testimony of Schmidt and Kosanko, for, though it is competent and material, as tending to support the theory of a conspiracy, and might have led to a different conclusion upon the evidence, the same result should have been reached.

Let the judgment and order be affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

DONOVAN, APPELLANT, v. McDEVITT ET AL., RESPONDENTS.

(No. 2,426.)

(Submitted October 7, 1907. Decided October 25, 1907.)

[92 Pac. 49.]

*Execution — Injunction — Actions — Accounting—Demurrer—
Complaint—Prayer—Record.***Complaint—Sufficiency—Demurrer.**

1. If, under the facts stated in a complaint, the plaintiff is entitled to the relief demanded, or *any* relief, it is proof against a general demurrer.

Execution Sale—Injunction—When It will not Lie.

2. Under section 1201 of the Code of Civil Procedure, a judgment debtor whose property was about to be sold under execution after the judgment had been otherwise satisfied, had a plain, speedy and adequate remedy at law, and therefore injunction did not lie to restrain the sale.

Actions—Accounting—When not Proper Remedy.

3. Where one knows the exact amount due him from another, an action at law for a money judgment will afford him all the relief to which he is entitled, and equity will not interfere by way of an accounting, the purpose of which is to have settled a complicated account, the exact status of which the plaintiff is unable to determine for himself.

Complaint—Demurrer—When It will not Lie.

4. Where it appeared from the face of a complaint that defendant was indebted to plaintiff in a certain amount for money had and received, the pleading was proof against a general demurrer, and the fact that plaintiff demanded equitable relief by way of an accounting was immaterial.

Actions—Forms.

5. While the principles applicable to those actions for which particular forms are required at common law are recognized in this state, there is, under section 460 of the Code of Civil Procedure, but one form for civil actions, whether they be at law or in equity.

Complaint—Prayer.

6. The prayer of the complaint is no part of the statement of a cause of action.

Same—Demurrer—When Improper.

7. While section 671 of the Code of Civil Procedure makes the prayer a part of the complaint, it is made such part independently of the statement of facts constituting the cause of action, and if the facts stated in the body of the complaint entitle plaintiff to any relief, it is error to sustain a general demurrer, no matter what may be the form of the prayer, or whether there be any prayer at all.

Same.

8. Informality of the prayer in a complaint, or the total absence of one, not being one of the defects named in section 680 of the Code of Civil Procedure for which a demurrer will lie to the complaint, a de-

36	61
36	319
136	457

36	61
39	403

36	61
41	331
41	353
41	395
141	429
41	491

36	61
140	470
40	585

murrer for that reason should not be sustained, notwithstanding the provision of section 1003 of the same code, that the relief granted to plaintiff, if there be no answer, cannot exceed that demanded in his complaint.

Appeal—Judgment-roll—Record—Sufficiency.

9. A certificate of the clerk of the district court, stating that the record on appeal in a civil case contains copies of all the papers constituting the judgment-roll, *held*, to be a sufficient compliance with the requirement of section 1736 of the Code of Civil Procedure, that upon appeal from a judgment the appellant must furnish the supreme court with a copy of the judgment-roll.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by James Donovan against James McDevitt and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Mr. C. A. Spaulding, for Appellant.

Messrs. Downing & Stephenson, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On November 5, 1901, James McDevitt recovered a judgment against the appellant, Donovan, in a mortgage foreclosure proceeding, and on April 19th following an order of sale was issued; but before the day of sale the parties entered into a stipulation which fixed the amount of Donovan's indebtedness to McDevitt, provided for its payment in certain installments, and for a stay of execution if such installments were paid. It also provided that McDevitt should collect rent from certain property belonging to Donovan, and apply such rentals toward the discharge of the judgment. The sum of \$695 was paid by Donovan on the judgment. On October 20, 1903, counsel for McDevitt, without notice to Donovan, secured an order of sale, had certain real estate seized and sold by the sheriff and, upon the sheriff's return being filed, had a deficiency judgment for \$223.07 docketed against Donovan, and on May 28, 1906, caused

an execution to be issued and certain real estate in Great Falls belonging to Donovan to be levied upon and advertised for sale to satisfy such deficiency judgment. Donovan thereupon commenced this action against McDevitt and the sheriff of Cascade county, setting forth the facts above narrated, and alleging, further, that between May 10, 1902, and November 11, 1904, McDevitt had collected rents from the property mentioned in the stipulation to the amount of \$675 with which he refused to discharge his deficiency judgment, and for which he has failed and refused to account. It is further alleged that McDevitt has no other claim against Donovan, and that, after satisfying such deficiency judgment, there still remains a balance due Donovan in the sum of \$451.93. The prayer of the complaint is for an injunction restraining the sheriff from selling the property seized or proceeding further under the execution, and that McDevitt be required to account for the rents received, and for general relief.

To this complaint the defendants interposed a general demurrer, which was sustained, and, the plaintiff electing to stand upon his complaint, his default was entered and judgment rendered and entered in favor of the defendants, dismissing plaintiff's complaint, dissolving a temporary restraining order theretofore issued, and awarding defendants their costs. From that judgment the plaintiff has appealed.

While some question is raised as to the sufficiency of the demurrer to raise the question determined by the district court, still, assuming, without deciding, that it was sufficient, it did not merely raise the question of the sufficiency of the allegations in the complaint to state a cause of action entitling plaintiff to the relief demanded. A general demurrer raises the question: Does the complaint state facts sufficient to constitute a cause of action? In other words, under the facts stated, is the plaintiff entitled to the relief demanded, or any relief? And, if so, the complaint is proof against a general demurrer. In 16 Encyclopedia of Pleading and Practice, 793, the rule is stated as follows: "Under Code procedure generally, the func-

tion of a demurrer in respect to pleadings is to determine the sufficiency of the facts alleged therein to constitute a cause of action or a defense, and not to determine whether or not facts are stated which are sufficient to entitle the pleader to the relief demanded. In other words, to sustain the demurrer it must appear that, upon the facts pleaded, no relief can be had."

(a) Does the complaint state facts sufficient to constitute a cause of action for an injunction? It is a well-recognized rule that a court of equity will not interfere to enjoin the enforcement of a judgment, if the judgment debtor has a plain, speedy and adequate remedy at law. And that the plaintiff Donovan had such a remedy in this instance is perfectly plain. Section 1201 of the Code of Civil Procedure, among other things, provides: "* * * Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment, or make such indorsement, and upon motion the court may compel it, or may order the entry of satisfaction to be made without it." Under this section, plaintiff could have had all the relief which an injunction would afford him, and for this reason his complaint does not state facts sufficient to warrant the issuance of an injunction. (*Gregory v. Ford*, 14 Cal. 139, 73 Am. Dec. 639; *Imlay v. Carpentier*, 14 Cal. 173; *Ketchum v. Crippen*, 37 Cal. 223.)

(b) Does the complaint state facts sufficient to entitle the plaintiff to an accounting? The purpose of a suit for an accounting is to have settled a complicated account, the exact status of which plaintiff is unable to determine for himself; for, if he knows the exact amount due him on the account, a court of law can furnish him a complete remedy. Under such circumstances, his action is one for a money judgment, and not a suit for an accounting.

According to the allegations in plaintiff's complaint, McDevitt has collected \$675 belonging to plaintiff, against which the defendant's only claim is his deficiency judgment amounting to \$223.07; so that, if these allegations be true, an action for a money judgment for \$451.93 would afford plaintiff all the

relief to which he could possibly be entitled, and, since he has this adequate remedy at law, equity will not interfere.

(c) Does the complaint state facts sufficient to entitle the plaintiff to any relief? We think it is sufficient upon its face to entitle the plaintiff to a money judgment. It sufficiently appears that the defendant is indebted to plaintiff in the sum of \$451.93 for money had and received, assuming the allegations of the complaint to be true, and, this being so, the complaint was proof against a general demurrer. It is immaterial that the plaintiff demanded equitable relief. (*Holden v. Warren*, 118 N. C. 326, 24 S. E. 770.) The rule is well settled that where plaintiff proceeds upon the theory that his remedy is by a suit in equity, but his complaint fails to state facts sufficient to entitle him to equitable relief but does state facts sufficient to entitle him to a money judgment, he will not be dismissed from court, but will be given the relief to which he appears to be entitled. (Bliss on Code Pleading, sec. 162.) This rule has been recognized and applied in this state. (*Goodrich Lumber Co. v. Davie*, 13 Mont. 76, 32 Pac. 282; *Aldritt v. Panton*, 17 Mont. 187, 42 Pac. 767; *Western Plumbing Co. v. Fried*, 33 Mont. 7, 114 Am. St. Rep. 799, 81 Pac. 394.) While we recognize the principles applicable to the different actions, particular forms for which are required at common law, we do not recognize the distinct forms for such actions. There is but one form for civil actions under our Code (Code Civ. Proc., sec. 460), whether the actions are at law or in equity.

The prayer of the complaint is no part of the statement of a cause of action. (*Fox v. Graves*, 46 Neb. 812, 65 N. W. 887; *Hiatt v. Parker*, 29 Kan. 765; Pomeroy's Code Remedies, sec. 580.) It is true that the prayer is made a part of the complaint by section 671 of the Code of Civil Procedure; but it is made such part independently of the statement of facts constituting the cause of action. And, if the facts stated in the body of the complaint entitle the plaintiff to any relief, a general demurrer will not lie, no matter what may be the form of the prayer, or, indeed, whether there is any prayer at all. (*Hiatt*

v. *Parker*, above; *Culver v. Rodgers*, 33 Ohio St. 537; *Sannoner v. Jacobson & Co.*, 47 Ark. 31, 14 S. W. 458; *Parker v. Norfolk etc. Ry. Co.*, 119 N. C. 677, 25 S. E. 722.)

It may be that the plaintiff cannot recover a money judgment without a prayer in his complaint demanding the same and stating the amount to which he deems himself entitled. But this question is not raised by a general demurrer, and this is so notwithstanding the provisions of section 1003 of the Code of Civil Procedure. The grounds of a demurrer are stated in section 680 of the Code of Civil Procedure, and neither the informality of the prayer nor the total absence of one is mentioned in that section. The defects for which a demurrer will lie are those named in the statute, and no others can be reached by it. (Bliss on Code Pleading, sec. 404; *Marie v. Garrison*, 83 N. Y. 14.)

In order to affirm the judgment of the district court, this court must find that the complaint does not state facts sufficient to entitle the plaintiff to *any* relief, and this we cannot do. It would be idle to speculate as to what situation would be presented in the event the plaintiff does not amend the prayer of his complaint, and the defendant McDevitt should decline to answer. No doubt that situation would be met by appropriate action on the part of the district court in case it should arise. (See, however, *Hall v. Hall*, 38 How. Pr. 97.)

Upon oral argument, and without any motion to dismiss the appeal, counsel for respondent suggested that this court should not consider the record presented upon this appeal because of certain defects mentioned, and referred to *Featherman v. Granite County*, 28 Mont. 462, 72 Pac. 972. But the doctrine announced in that case was modified in the later case of *Glavin v. Lane*, 29 Mont. 228, 74 Pac. 406. The Code requires that upon appeal from a judgment the appellant must furnish this court with a copy of the judgment-roll. (Code Civ. Proc., sec. 1736.) In this instance the clerk certifies that the record furnished does contain copies of all papers constituting the judgment-roll, and we think there is therefore a sufficient compli-

ance with the provisions of that section, under the facts of this case.

The judgment is reversed and the cause remanded to the district court, with directions to vacate the judgment entered, annul the order sustaining the demurrer, and overrule the demurrer.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

MCGOWAN, APPELLANT, v. NELSON ET AL., RESPONDENTS.

(No. 2,436.)

(Submitted October 9, 1907. Decided October 25, 1907.)

[92 Pac. 40.]

36	67
37	446
d38	155
38	156
d38	363
36	67
139	62
39	349

Personal Injuries—Master and Servant—Evidence—Sufficiency—Nonsuit—Presumptions—Res Ipsa Loquitur.

Personal Injuries—Master and Servant—Evidence—Sufficiency—Nonsuit.

1. Where the evidence introduced by plaintiff, in an action for damages for personal injuries claimed to have been caused by the negligence of his employers, showed that the accident occurred while he was engaged as a carpenter on the lower floor of a building in course of construction, by reason of two planks falling upon him from an upper story, but failed to disclose how they happened to fall—whether on account of the negligence of defendants in allowing them to be improperly piled, or by reason of the negligence of some fellow-servant in handling them—nonsuit was properly granted.

Same—Evidence—Failure to Call Witnesses—Presumptions.

2. The failure of plaintiff in the action set out in the foregoing paragraph to call as witnesses in his behalf several of his coemployees—presumably fellow-servants—who were present at the time and place of the injury, raised the presumption that their testimony would have been unfavorable to him.

Same—Res Ipsa Loquitur—When Doctrine will not Apply.

3. The doctrine of *res ipsa loquitur* rests upon the presumption that, in view of the surrounding circumstances, the accident to plaintiff would not have happened if defendant had exercised ordinary care; therefore, where the evidence was silent as to the cause of the accident and the attendant circumstances left room for the conclusion that the injury complained of might have occurred by reason of the negligence of plaintiff's fellow-servants, the doctrine cannot be invoked.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by James P. McGowan against George Nelson and Hans Pederson. From a judgment of nonsuit plaintiff appeals. Affirmed.

Messrs. Maury & HogevoU, for Appellant.

Only such risks and dangers which an employee might observe or could observe are assumed. (*McCabe v. Montana C. Ry. Co.*, 30 Mont. 323, 76 Pac. 701.) A case such as this should not be taken away from the jury unless only one conclusion could be drawn, and that conclusion would be, in our own case, that plaintiff had assumed the risk. (*Cain v. Gold Mt. Min. Co.*, 27 Mont. 527, 71 Pac. 1004; *Michener v. Fransham*, 29 Mont. 240, 74 Pac. 448; *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871; *Nord v. B. & M. Con. C. & S. M. Co.*, 30 Mont. 48, 75 Pac. 681; *Soyer v. Great Falls W. Co.*, 15 Mont. 1, 37 Pac. 838.)

A servant does not assume even the negligence of his fellow-servants, except the servant is in such a position that he can protect himself from the negligence of the fellow-servant. (*Wren v. Golden T. Min. Co.*, 24 Wash. 261, 64 Pac. 174.)

The very fact that defendants have to plead contributory negligence and assumption of risk implies that they have to prove it, and, therefore, when a *prima facie* case is made out, if they do not prove what they have pleaded, the judgment should be for the plaintiff. (Labatt on Master and Servant, sec. 1669; *Freeman v. Glens Falls P. M. Co.*, 61 Hun, 125, 15 N. Y. Supp. 657.)

If one person has placed objects in such a position that they are liable to fall on another person, the doctrine of *res ipsa loquitur* is applicable. (Labatt on Master and Servant, sec. 2303.)

Messrs. Sanders & Sanders, for Respondents.

A building while in course of construction undergoes constant changes and passes through successive temporary conditions,

many of which from the very necessity of construction must be dangerous, and hence momentarily unsafe places wherein the servant must work must of necessity exist. The rule applicable to such a case is that the law does not impose upon a master the duty of furnishing a reasonably safe place for the servant to work in, at every moment of his work. (*Richardson v. Anglo-American Prov. Co.*, 72 Ill. App. 77; *Galow v. Chicago etc. Ry. Co.*, 131 Fed. 242, 65 C. C. A. 507; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440; *Armour & Co. v. Dumas* (Tex. Civ. App.), 95 S. W. 710; *Fournier v. Pike*, 128 Fed. 991; Labatt on Master and Servant, secs. 587, 588, 612a.) In such cases the giving of the usual instruction that a master must use reasonable care to furnish a reasonably safe place is error. (*Fallon v. Mertz*, 110 App. Div. 775, 97 N. Y. Supp. 417.)

The doctrine of *res ipsa loquitur* does not dispense with the rule that the party who alleges negligence must prove it. It merely determines the mode of proving it. (*Baltimore & Ohio E. R. Co. v. Greer*, 103 Ill. App. 448.) The mere happening of an accident is no presumption of negligence on the part of defendant. (*Bahr v. Lombard Co.*, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; *Davidson v. Davidson*, 46 Minn. 117, 48 N. W. 560; *Robinson v. Charles Wright & Co.*, 94 Mich. 283, 53 N. W. 938.) In the absence of affirmative and positive proof of negligence, the simple fact of an accident and injury would rather be attributable presumptively to misadventure, inevitable fate and other causes for which defendant would not be liable. (*Schultz v. Pacific etc. Co.*, 36 Mo. 13; *Nolan v. Schikle*, 3 Mo. App. 304; *Mitchell v. Chicago etc.*, 51 Mich. 236, 47 Am. Rep. 566, 16 N. W. 388; *McGrell v. Buffalo etc.*, 153 N. Y. 265, 47 N. E. 305; *Faris v. Hoberg*, 134 Ind. 269, 39 Am. St. Rep. 261, 33 N. E. 1028.) Before the doctrine can be invoked, the evidence must show that there is no other equally proximate, apparent cause of the accident besides that for which defendant is liable. (8 Ency. of Ev. 874 (2); *Alexander v. P. W. Co.*, 201 Pa. St. 252, 50 Atl. 991, 993; *Reese v. Clark*, 146 Pa. St. 465, 23 Atl. 246; *Hawthorne v. Salt Co.*, 10 Pa. Co. Ct. Rep. 77; *Wojci-*

chowski v. Refining Co., 177 Pa. St. 57, 35 Atl. 596; *Zaliniger v. Torpedo Co.*, 190 Pa. St. 350, 42 Atl. 707; *Snodgrass v. Steel Co.*, 173 Pa. St. 228, 33 Atl. 1104; *Shafer v. Lacock*, 168 Pa. St. 497, 32 Atl. 44, 29 L. R. A. 254; *East End Oil Co. v. P. F. Co.*, 190 Pa. St. 350, 42 Atl. 707, 708; *Redmond v. Lumber Co.*, 96 Mich. 545, 55 N. W. 1004, and cases in opinion; *Soderman v. Kemp*, 145 N. Y. 427, 40 N. E. 212; *Allen v. K. C. Mills*, 27 R. I. 89, 60 Atl. 770, 773; *Redmond v. D. L. Co.*, 212 Pa. St. 54, 61 Atl. 572; *Jack v. McCabe*, 56 App. Div. 378, 67 N. Y. Supp. 810; *Searles v. Railway Co.*, 101 N. Y. 661, 5 N. E. 66; *Taylor v. City of Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642; *Griffin v. Manice*, 36 Misc. Rep. 364, 73 N. Y. Supp. 563 (overruling authorities cited by appellant in his brief from the N. Y. Supp.); *Goransson v. R. C. Mfg. Co.*, 186 Mo. 300, 85 S. W. 339; *Shore v. A. B. Co. of N. Y. (Mo.)*, 86 S. W. 907; *Purcell v. Tennant Shoe Co.*, 187 Mo. 276, 86 S. W. 121; *Cothron v. C. P. Co.*, 98 Mo. App. 343, 73 S. W. 279; *O'Connor v. C. R. I. & P. Ry. Co.*, 129 Iowa, 636, 106 N. W. 161; *Strassburger v. Vogel*, 103 Md. 85, 63 Atl. 202; *Duhme v. H. A. P. Co.*, 184 N. Y. 404, 112 Am. St. Rep. 615, 77 N. E. 386; *Hanson v. S. L. Co.*, 31 Wash. 604, 72 Pac. 457; *Texas & Pac. Ry. Co. v. Barret*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; *Carnegie Steel Co. v. Byers*, 149 Fed. 667, 673; *O'Connor v. Railway Co.*, 83 Iowa, 105, 48 N. W. 1002; *Brownfield v. Railway Co.*, 107 Iowa, 254, 77 N. W. 1038; *Brymer v. Railway Co.*, 90 Cal. 496, 27 Pac. 371; *Huff v. Austin*, 46 Ohio, 386, 15 Am. St. Rep. 613, 21 N. E. 864; *Wormell v. Railway Co.*, 79 Me. 397, 1 Am. St. Rep. 321, 10 Atl. 49; *Grant v. Railway Co.*, 133 N. Y. 657, 31 N. E. 220; *Northern Pac. Ry. Co. v. Dixon*, 139 Fed. 740, 71 C. C. A. 555; *Pieschel v. Miner*, 30 Misc. Rep. 301, 63 N. Y. Supp. 508; *Peirce v. Kile*, 80 Fed. 865, 26 C. C. A. 201; *Breen v. St. L. C. Co.*, 50 Mo. App. 202; *Early v. Ry. Co.*, 66 Mich. 349, 33 N. W. 813; *Quincy M. Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240; *The France*, 59 Fed. 479, 8 C. C. A. 185.)

MR. JUSTICE SMITH delivered the opinion of the court.

This action was begun in the district court of Silver Bow county to recover of the defendants the sum of \$5,000 damages, alleged to have been sustained by the plaintiff by reason of an injury received by him while in the employ of the defendants.

The charging part of the complaint is as follows: "That it was the duty of his (plaintiff's) master, defendants, Nelson and Pederson to use reasonable diligence and care to the end that this plaintiff have a safe place to work. That disregarding the said duty the defendants negligently allowed to remain piled, and caused to be piled, about twenty (20) feet above where plaintiff was working and out of sight of the plaintiff, a large pile of loose plank so negligently piled as to be in a condition of unstable equilibrium and in a condition of such equilibrium that the slightest jar of workmen walking by the said pile would overturn it, and so that the slightest wind would overturn the said pile of plank. That there was some jar occasioned by some means unknown to plaintiff, and the said pile of plank fell over on and upon the said plaintiff, through the negligence of the defendants, while the plaintiff was working underneath the said pile of plank, and while the plaintiff was exercising all care on his part. That one of the said planks from the said pile, being about twelve feet long, two inches thick, and eight inches wide, through the said negligence of the defendants in piling the same, as aforesaid, fell from the said pile, a distance of twenty (20) feet, and thus the defendants did strike the plaintiff with the said plank with great force and dislocated the right scapula in plaintiff's shoulder and injured plaintiff's hand and permanently injured plaintiff to his damage in the sum of five thousand dollars (\$5,000), no part of which has ever been paid."

The answer puts in issue the material allegations of the complaint and pleads affirmatively contributory negligence on the part of the plaintiff and assumption of risk.

The plaintiff's testimony was: That on the fifteenth day of June, 1906, he was in the employ of the defendants, carrying

lumber up from the second basement of what was called the "Symons Building," in the city of Butte, and handing it up to the man on the floor above; that on that day he was struck on the shoulder with a plank, which knocked him down, broke his shoulder, and hurt him in the back of the neck. He says: "I happened to stand in that particular place where I was hurt because there was no other place to stand except right over the hole where we were putting the lumber up. I should judge the lumber was going about twenty feet above me. I hoisted it up to the first floor, and then another man took it and hoisted it to another floor again. The place where the lumber was being piled was not in sight of me. I could not see it. My back was this way, and that kept me from looking up where it was. Three planks came down. They came right down in a bunch. One hit me—maybe two—and it knocked me out, and they carried me down to the platform and put me in a wheelbarrow. I have not been able to do anything since then except watching. My shoulder has prevented me from working. The planks came from the second floor from where I was, the second floor above me. I expected that these planks were to be used as floor joists on that second floor above where I was. As to whether I could see plank lying along upon the floor, I never looked above. I don't think I could have seen that there were these plank lying across the floor beams or girders if I had looked. There was a hole there, and these plank were piled along there. I could not see that lumber piled there. I never looked at the floor above. I was very busy shoving lumber up above me. I don't see how I could have seen that condition of the lumber above if I had looked. I expected that these planks were being taken up there for floor joists. I did not know where. It is a big building. I should judge three planks came down, and some of them hit my shoulder; one hit me, I know that. It knocked me out. I stayed there for maybe three-quarters of an hour after being struck; then I walked home. I was in the basement, and I went from there to Nelson's office and from there home. I went to Mr. Nelson's office for my coat.

At that time I said a carpenter had dropped some plank on me; I said that somebody dropped a plank on me. I told Mr. Nelson and everybody that there was a plank dropped on me. It must have been a carpenter that dropped it, because he fired the carpenter then and there. I said somebody handling lumber above dropped a plank on me; I suppose it was a carpenter."

Thomas Frazer testified for the plaintiff: "I saw something happen there on that day to Mr. McGowan. He was hurt. A plank struck him. A plank came down through the upper floor. I was standing about fifteen feet away from McGowan when that plank came down. I was not on a level with him. He was on the station, and I was below him. I think two planks came down at that time. I am not certain how many planks came down. I should judge the plank was about twelve feet long, two by eight inches. I don't know what distance it fell. They fell two floors. I could not say the number of feet. The floor right above McGowan was the place he was passing the plank through. The floor right over him had been laid. They were working on the second floor above him. All of it had not been laid."

James Burns testified for the plaintiff: "There was a manhole in the floor immediately above McGowan, right over his head. He was passing timbers up through a manhole. The manhole was six or eight feet square. The floor immediately above McGowan had been laid. It was closed. The second floor above him was just a skeleton. They had started to put in their timbers there. I heard a holler when McGowan was hurt, and as I turned around this plank was falling down this hole where McGowan was working. The plank was falling from the skeleton that they were erecting for the next floor. I could not swear as to how it happened to fall. I looked up that way, and I saw some men standing right immediately where the plank was falling from. I do not know how many planks fell. When I looked up and saw the men they were standing up. I did not notice their arms. They were standing pretty near directly over the manhole—not quite, a little north. There was

some plank there still that did not fall. They were putting the planks in bunches of 12 to 14, which would cover a span. That was the regular way, and then they would put up the next span between the pillars. They were piling them at every span. They were in piles sometimes two feet thick. When I heard that outcry I could not tell exactly how many men exactly were at the top of the shaft there. There were people supposed to be backing the timbers away from where McGowan put the timbers up, and there was a gang stationed above so they could take them out to the floor. They piled it out on the floor that was finished. Immediately at the top of this manhole the floor was cemented over, and they were piling the planks on that, on the floor where the fall came from. I saw the plank while it was still falling. I looked up as soon as I heard the holler. As soon as the plank went by I looked up. I do not know the two men standing at the top of that shaft. I did not see either of those two men have hold of either of those two planks which fell. I do not know in what position the arms of these men standing at the top of the manway were with reference to those planks just after the planks passed me when I looked up, for the simple reason that when I saw the plank fall I ran over to the manway. I know there were men working there. The men said nothing, only hollered." On cross-examination the witness testified that he did not know how the planks happened to fall; also, that he did not know when the lumber that fell was piled above, and that the men standing around it were carpenters.

John Bohrer testified for the plaintiff: "I do not know where these planks came from; how close to the manway, the ones that fell." He further testified that the manhole had no frame around it. "The concrete floor distinguished the manhole from the entire space. There was not a concrete floor around it. They were putting the girders around and left the manhole. They were building the manway up the way they were going with their floors. It had not been built, just the uprights and the girders. The girders were from one set of the manway to

the other. The manway was marked out by a square of girders and timbers." The witness did not notice which way the planks fell, and did not know whether they fell through the aperture of the manway or not. The witness Bohrer further testified, on being recalled: That there were two men on the floor, two carpenters, close to the end of the manhole, "working close to where the planks fell. They were close to this pile of planks west of the manhole, and were putting those two by eight inch by twelve planks down. They were nailing the cross-pieces down between the girders, lengthwise of the pile of planks." But he could not tell whether they were taking their planks from the pile or not.

At the conclusion of plaintiff's testimony, of which the foregoing is a summary, the defendant moved the court to enter an order of nonsuit, for the reason, among others, that the evidence offered and introduced by the plaintiff did not support the allegations of the complaint. This motion was granted, and from a judgment entered in favor of the defendants, the plaintiff appeals.

From the foregoing statement of plaintiff's evidence, it will be seen that no testimony was offered showing how the accident occurred. The planks fell, but there was no testimony as to how they happened to fall—whether by reason of the negligence of the defendants in allowing them to be improperly piled or piled in an unsafe place, or in an unsafe or dangerous manner, or by reason of the negligence of some fellow-servant of the plaintiff in handling the planks. This being the case, this cause comes directly within the rule laid down by this court in the cases of *Howie v. California Brewery Co.*, 35 Mont. 264, 88 Pac. 1007, and *Olsen v. Montana Ore Pur. Co.*, 35 Mont. 400, 89 Pac. 731.

The testimony of plaintiff's witnesses shows that several co-employees of plaintiff, presumably fellow-servants, were at the place on the upper floor from which the planks fell. Why were these men not called as witnesses by the plaintiff? As they were not called, the presumption arises that their testimony would

have been unfavorable to his cause. In the case of *The Joseph B. Thomas* (D. C.), 81 Fed. 578, cited by appellant, this rule of presumption was invoked.

The doctrine of *res ipsa loquitur* does not apply to this case for the reason that the thing does not speak for itself. There is testimony, of course, that the plank fell, but why it fell, by what agency, or from what cause, does not appear. Under these circumstances, it is impossible to apply the rule contended for by the appellant to this case.

The rule involved in the doctrine *res ipsa loquitur* is laid down in the case of *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29, as follows: "Where the thing which causes the injury is shown to be under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have such management and control use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of ordinary care by the defendant. Under such circumstances, proof of the happening of the event raises a presumption of the defendant's negligence, and casts upon the defendant the burden of showing that ordinary care was exercised."

It will be seen that this rule rests upon presumption; that is, that in view of the surrounding circumstances the accident would not have happened, had the defendant used ordinary care. When the surrounding circumstances leave room for a different presumption, as in this case, that the injury occurred, or may have occurred, by reason of the negligence of fellow-servants, the reason of the rule fails, and the doctrine *res ipsa loquitur* cannot be invoked.

The judgment of the district court of Silver Bow county is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
CONCUR.

NEUMAN, RESPONDENT, v. GRANT, APPELLANT.

(No. 2,439.)

(Submitted October 11, 1907. Decided October 25, 1907.)

[92 Pac. 43.]

*Mechanics' Liens—Joinder of Causes of Action—Verified Account—Sufficiency—Costs.***Mechanics' Liens—Joinder of Causes—On Contract—Quantum Meruit—When Permissible.**

1. Where plaintiff in a suit to foreclose a mechanic's lien joined a count on an express contract for the construction of a cistern, with a count on a *quantum meruit*, the averments of each not having been so inconsistent as to be contradictory, and where the defendant was not misled to his prejudice, a demurrer on the ground of ambiguity and uncertainty was properly overruled.

Same—Verified Account—Sufficiency.

2. A verified account attached to a mechanic's lien statement, reciting a charge for excavating a cistern, \$8, mason's helper, \$6, drayage, 50 cents, cement, \$8.75, lime, \$5, sand, \$1.50, brick, \$20, mason's work and contractor's services, \$20.25, total, \$70, constituted a substantial compliance with Code of Civil Procedure, section 2131, as amended by Laws of 1901, page 162, requiring the filing with the county clerk of a just and true account of the amount due after allowing all credits, etc.

Same—Costs—Improper Allowance.

3. Under section 1863 of the Code of Civil Procedure, prescribing the costs allowable in a suit to foreclose a mechanic's lien, it was error to allow items charged for preparation and verification of the lien and for abstract of title to the property covered by the lien.

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

ACTION by A. T. Neuman against E. R. Grant. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Mr. Chas. W. Pomeroy, for Appellant.

Mr. B. F. Maiden, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

This is an appeal from a decree of foreclosure of a mechanic's lien, entered by the district court of Flathead county. The complaint contains two counts, so called. The charging part

of the first count is as follows: "That heretofore, to-wit, on or about the fifteenth day of August, 1905, this plaintiff and the said defendant, Grant, entered into a contract and agreement, as follows: Said plaintiff, at the special instance and request of the defendant, Grant, agreed to dig, and excavate, wall up with brick, line with cement, and finish in a good and workmanlike manner, one fifty-barrel cistern on the premises hereinafter described, and then and there and now belonging in fee to the said Grant, situate in the town of Whitefish, county of Flathead, and state of Montana, all for a reasonable sum; and said Grant agreed that, in consideration of the plaintiff's doing such work and furnishing such material, he would pay to said plaintiff, upon the completion of such work, a reasonable sum therefor. That thereafter, in a reasonable time, to-wit, before the twenty-ninth day of October, 1905, plaintiff did all the work and furnished all the materials on and about the construction of said cistern, and completed the same in a good and workmanlike manner. And that such work and materials were and are reasonably worth the sum of seventy (\$70.00) dollars."

The second count sets forth: "That heretofore, to-wit, on or about the fifteenth day of August, 1905, this plaintiff and said defendant, Grant, entered into an agreement and contract as follows: Said plaintiff, at the special instance and request of said Grant, agreed to dig and excavate, wall up with brick, line with cement and finish in a good and workmanlike manner, one fifty-barrel cistern on the premises hereinafter described and then and there and now belonging to the said Grant in fee, situate in the town of Whitefish, county of Flathead, and state of Montana, all for the sum of \$70; and said Grant agreed that in consideration of the plaintiff's doing such work and furnishing such material, he would, on such completion of the same pay to the said plaintiff the sum of seventy (\$70.00) dollars. That thereafter, in a reasonable time, before the 29th day of October, 1905, [plaintiff] did all the work and furnished all the materials, in, on, and about such construction of said cistern, and completed the same in a good and workmanlike manner."

Defendant filed a demurrer to this complaint, as follows: "That the said complaint is ambiguous: (a) In that two causes of action are therein attempted to be stated, neither of which are sufficiently distinct and separate so as to enable the defendant to determine whether the plaintiff relies upon the one or the other for his recovery. (b) In that one cause of action is stated in two separate counts which are contradictory and inconsistent." The court overruled the demurrer, and, in default of further pleading on defendant's part, entered a decree of foreclosure of the lien. Defendant appeals.

It is urged on the part of appellant that the court erred in overruling his demurrer, and he relies chiefly on the case of *Keed v. Poindexter*, 16 Mont. 294, 40 Pac. 596, where the late Justice De Witt, speaking for the court, said: "The complaint was certainly ambiguous. The two causes of action to which the demurrer refers are in fact but one cause of action, differently stated, and contradictorily stated. The plaintiffs sought to follow the personal property into the hands of Poindexter and Jones, who were persons other than the original purchaser of the property. The complaint stated in one place that the property was transferred to said Poindexter and Jones as assignees for the benefit of creditors. Again, the complaint stated that the transfer was made to these persons in payment of a debt due by the Commercial Company to said Poindexter. One of these statements may be true. They are certainly not each true, for the reason that they contradict each other. It is true, as the defendants set up in their demurrer, that they cannot determine upon which of these contradictory allegations the plaintiffs rely. One may not set up his cause of action in terms which contradict each other and expect a defendant to answer. We think the judgment must be sustained upon the second ground of the demurrer." We, however, do not understand that case to be in point here. There the allegations in the different counts were inherently contradictory, and, as the court said, both could not possibly be true. In the case at bar the allegations in both counts may have been true. The contract be-

tween the parties, being oral, may have been to the effect that the defendant would pay what the work was reasonably worth, to-wit, \$70. The complaint shows that both counts spring from the same transaction or agreement.

The case of *Blankenship v. Decker*, 34 Mont. 292, 85 Pac. 1035, seems to cover the question at issue. In that case this court said: "That the court may, in its discretion, under Code of Civil Procedure, section 672, permit the same cause of action to be stated in different counts in order to meet the exigencies of the case as presented by the evidence, counsel for defendants concede." And: "Upon a complete performance of an express contract for services at a stipulated compensation, there seems to be no sound reason why a recovery may not be had upon the *quantum meruit*. In such case the effect of proof of the express contract is to make the stipulated compensation the *quantum meruit* in the case; and, the fact that it must be evidenced by a writing being a matter of proof and not of pleading, the form of the pleading does not affect the merits." In this case there was no answer, and the evidence offered by the plaintiff is not in the record. The following cases seem to be in point: *Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Fells v. Vestvali*, 2 Keyes (N. Y.), 152; *Livingston v. Wagner*, 23 Nev. 53, 42 Pac. 290. (See, also, Bliss on Code Pleading, sec. 120; 5 Ency. of Pl. & Pr. 321, and notes.)

We find nothing in the Codes to prohibit the plaintiff, acting in good faith, from stating a single cause of action in two counts, as was done in this case—when the averments of each are not so inconsistent as to be contradictory, and the allegations of either, or both, may be true, dependent upon the evidence to be produced, where the defendant is not misled to his prejudice, and the exigencies of the case seem to demand such form of pleading. (*Berry v. Craig* (Kan.), 91 Pac. 913.)

Appellant's second contention is that "the complaint does not support the decree of the court recognizing the validity of the lien," because "the statement of plaintiff's claim in the lien

is entirely at variance with that alleged in the two counts of the complaint." The following is a copy of the verified account attached to and made a part of the claim of lien: "Specifications of labor and material used on said contract: Work—Excavating, \$8.00; mason's helper, \$6.00; drayage, \$.50. Material—Cement, \$8.75; lime, \$5.00; sand, \$1.50; brick, \$20.00. Mason's work and all services of A. T. Neuman, contractor, \$20.25. Total, \$70.00."

In the case of *McGlauffin v. Wormser*, 28 Mont. 177, 72 Pac. 428, this court said: "The manner of perfecting a mechanic's lien consists of various steps, which are purely statutory, and, while the statute is in some respects remedial in its nature, and thus far should be construed liberally, it creates a new right, and the statutory proceedings by which this new right is perfected and enforced must be strictly followed." We think the claim of lien in this case was in substantial compliance with the statute. If anything, it was more specific than was necessary, under section 2131, Code of Civil Procedure, as amended by Laws of 1901, page 162. This court, in the case of *Black v. Appolonio*, 1 Mont. 342, said that all the statute requires is that the claimant should honestly state his account.

The trial court allowed the plaintiff, as costs, \$5 for preparation and verification of lien, and \$1.50 for abstract of title to the property covered by the lien. There was no warrant for this. The right to collect costs is purely statutory, and our statute (Code Civ. Proc., sec. 1863) does not cover these items.

This cause is remanded to the district court of Flathead county, with directions to strike from the judgment the two items of costs above mentioned, whereupon the judgment will stand affirmed, as so modified.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

POPE, APPELLANT, v. ALEXANDER ET AL., RESPONDENTS.

(No. 2,365.)

(Submitted May 21, 1907. Decided October 28, 1907.)

[92 Pac. 203.]

*Public Highways—Establishment by Prescription—Evidence—Sufficiency—Findings—Record—Appeal—Scope of Review in Equity Cases.***Public Highways—By Prescription—Evidence—Sufficiency—Review.**

1. In an action to quiet title to a portion of a city lot, evidence reviewed and held not to so clearly preponderate against a finding of an adverse use by the public for the full statutory period as not to support a conclusion that the strip had become a public highway by prescription, and for that and the further reason that plaintiff had never at any time, until shortly before bringing his action, attempted to obstruct travel over or assert ownership of, the strip, the finding of the trial court will not be disturbed on appeal. (See, also, Opinion on Motion for Rehearing.)

Same—Appeal—Record—Evidence—Review.

2. Where in the record on appeal, in an action to quiet title to a portion of a city lot, claimed by defendants to have been dedicated for street purposes, substantial portions of the evidence were unintelligible by reason of the witnesses, when referring to certain points upon plats before them, indicating them by the use of the words "here" and "there," without identification by means of marks or letters, thus making it impossible for the appellate court on a review of the evidence to understand the full purport of their statements, a finding that the strip of land in controversy had become a public highway by prescription will not be said to be contrary to the weight of the evidence. (See, also, Opinion on Motion for Rehearing.)

Same—Prescription—Findings—Evidence—Sufficiency.

3. While the evidence of a party seeking to establish a public highway by prescription, without color of title, by proof of travel over it for the statutory period, must clearly and convincingly show a use of the identical strip of land over which the right is claimed, and travel generally over an uninclosed lot of ground is not sufficient, yet where the evidence tended to show a definite line of travel over such land for a period of twenty-three years, and where the party asserting ownership knew of the conditions existing, but did not attempt to interfere with or question the right acquired by such use, a finding of adverse use for the statutory period will not be overturned on appeal. (See, also, Opinion on Motion for Rehearing.)

Same—Findings—Evidence—Harmless Error.

4. The correctness of a finding of adverse use of a portion of a city lot for a sufficient length of time to establish a street by prescription is not affected by an alleged error of the court in making a finding upon the subject of dedication based on incompetent evidence.

Appeal—Equity Cases—Scope of Review.

5. (On Motion for Rehearing.) While in equity cases the supreme court, under amended section 21, Code of Civil Procedure, (Laws 1903, Second Extra. Session, p. 7), is required "to review all questions of fact arising upon the evidence presented in the record * * * and determine

36	82
39	370
36	82
41	9
41	555
36	82
40	565

the same," the review may go no further than to determine whether there is a decided preponderance in the evidence against the findings of the trial court, and it will not undertake to try a cause and determine it as does the district court.

Appeal—Record—Findings—Evidence—Sufficiency—Presumptions.

6. (On Motion for Rehearing.) Where much of the testimony presented for review, in an action wherein it was sought to establish a street by prescription, was unintelligible by failure of counsel to have witnesses designate by some mode of identification certain points upon maps introduced in evidence, the presumption must obtain that the testimony, thus rendered unintelligible on review, was understood by the court making it as lending support to its finding in favor of the issue.

Appeal from District Court, Lewis and Clark County; Henry C. Smith, Judge.

ACTION by John D. Pope against Samuel Alexander and others to quiet title to portion of a city lot. From a judgment for defendants and from an order denying him a new trial, plaintiff appeals. Affirmed.

Messrs. Word & Word, for Appellant.

A description in a deed which has neither a place of beginning nor a place of ending is void, and the deed passes no title to the premises in controversy. (*Mann v. Taylor*, 4 Jones, 272, 69 Am. Dec. 750; *Brandon v. Leddy*, 67 Cal. 43, 7 Pac. 33; *Holme v. Strautman*, 35 Mo. 293; *Carter v. Barns*, 26 Ill. 445; *Wilson v. Johnson*, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930; *Wilson v. Inloes*, 6 Gill (Md.), 121; *Bailey v. White*, 41 N. H. 337; *Kea v. Robertson*, 40 N. H. 373; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *Baker v. Southern Ry.*, 125 N. C. 596, 74 Am. St. Rep. 658, 34 S. E. 701; Devlin on Deeds, sec. 1010 et seq.; 13 Cyc. 543, notes 31, 32; 3 Washburn on Real Property, 5th ed., pp. 400, 405.) The ambiguity in the description of the property in question is a patent ambiguity (Wigmore on Evidence, sec. 2407); one which parol evidence is not admissible to explain or remove. If the person named in a deed does not exist, the instrument is inoperative. (*Harriman v. Southman*, 16 Ind. 190; *Lillard v. Rucker*, 17 Tenn. 64; *United States v. Southern Colo. etc. Coal etc. Co.*, 18 Fed. 273, 5 McCrary, 563; *Barr v. Schroeder*, 32 Cal. 619.)

No one except the owner of an unlimited estate or an estate in fee simple can make a dedication of land. (13 Cyc. 442, and cases cited; *Gridley v. Hopkins*, 84 Ill. 530; *Town of Mt. Vernon v. Young*, 124 Iowa, 517, 100 N. W. 694; *Culmer v. Salt Lake City*, 27 Utah, 252, 75 Pac. 620; *Coburn v. San Mateo*, 75 Fed. 520; *Lewis v. Portland*, 25 Or. 133, 42 Am. St. Rep. 772, 35 Pac. 256, 22 L. R. A. 736; *McShane v. City of Moberly*, 79 Mo. 43; *Ward v. Davis*, 3 Sandf. (N. Y.) 513.) "In order to constitute a valid dedication, there must be an intention on the part of the owner to devote his property to the public use, and the intention must be clear and unequivocally manifested." (13 Cyc. 452; *Hartford v. Railway Co.*, 59 Conn. 250, 22 Atl. 37; *Fisk v. Havana*, 88 Ill. 208; *Lewis v. Portland*, 25 Or. 133, 42 Am. St. Rep. 772, 35 Pac. 256, 22 L. R. A. 736; *State v. Trask*, 6 Vt. 355, 27 Am. Dec. 554; *Coburn v. San Mateo County*, 75 Fed. 520; *Kansas City & O. Ry. Co. v. State*, (Neb.), 105 N. W. 713.)

A right of way by prescription or adverse use cannot be acquired over open prairie lands over which anyone could pass. (*Coburn v. San Mateo Co.*, 75 Fed. 532; *Warren v. Jacksonville*, 15 Ill. 236, 58 Am. Dec. 610; *State v. Horn*, 35 Kan. 717, 12 Pac. 148; *Town v. McClintock*, 150 Ill. 133, 36 N. E. 976; *Rose v. City of Farmington*, 196 Ill. 226, 63 N. E. 631; *Watson v. Board of County Commissioners*, 38 Wash. 662, 80 Pac. 201; *Engle v. Hunt*, 50 Neb. 358, 69 N. W. 970; *Gulf Ry. Co. v. Montgomery*, 85 Tex. 64, 19 S. W. 1015.)

Messrs. Wallace & Donnelly, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to quiet the title to a parcel of land described as the south 47 feet of lot 3, in block 1 of the Shaw addition to the city of Helena, Lewis and Clark county, and all that portion of lot 4, in the same block of said addition, lying between lot 3 and the north boundary line of the original

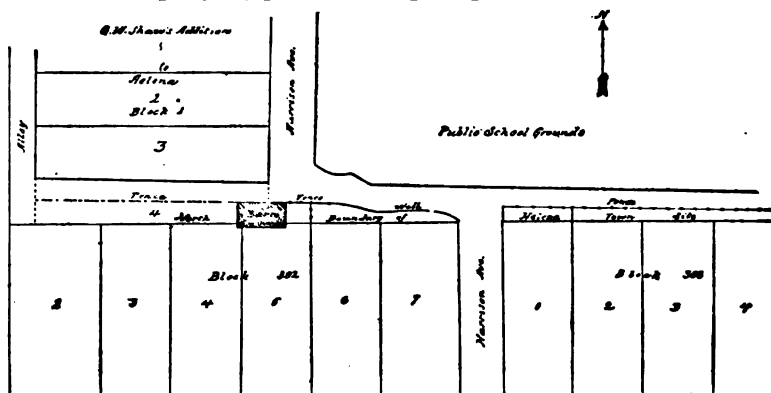
Helena townsite, according to the McIntyre survey of said townsite.

The complaint contains the usual allegations of ownership, right of possession, etc., in plaintiff, and of an adverse claim by the defendants, which is declared to be without foundation, and concludes with a prayer for a decree quieting plaintiff's title. The defendants deny that plaintiff is the owner or entitled to the possession of any of the land in controversy. They deny any claim to, or interest in, lot 3, or any portion thereof. They deny that there is any such lot in block 1 as that designated as lot 4 in the plat of the Shaw addition, or that the plaintiff or his predecessors in interest ever owned, or claimed to own, any such lot or parcel of ground prior to the platting of said addition. They allege that at the time the said addition was platted the predecessors of plaintiff wrongfully and unlawfully appropriated a certain alley or roadway, which had theretofore been dedicated for such use by the owners thereof and for many years had been used and enjoyed as such by the public, and included the same in said plat as a part thereof designated as lot 4. They further allege that for more than twenty-five years prior to the bringing of this action the portion of lot 4 in controversy had been used generally by the public, and particularly by the defendants, as an alley or roadway, openly, continuously, uninterruptedly, exclusively and adversely to the claim or claims of all persons whomsoever, and particularly the plaintiff, and they plead and rely upon the statute of limitations (Code Civ. Proc., secs. 483, 484, 487-489, 490) applicable to actions for the recovery of lands. The answer concludes with a prayer that plaintiff be adjudged to have no title or interest in the strip alleged to be an alley or roadway, and that he be enjoined from asserting any claim thereto. The plaintiff by replication put in issue all these affirmative allegations.

The issues, thus framed, were submitted to a jury, which made special findings in favor of the defendants, except as to adverse use. Upon this issue the finding was for plaintiff. The latter finding the court set aside and found for defendants and

directed judgment to be entered accordingly. The plaintiff has appealed from the judgment and an order denying a new trial.

The controversy of the parties is made clear by an inspection of the accompanying plat. The open space on the south margin



represents Lawrence street in the original townsite of Helena. The defendants own and occupy lots 2, 3, 4 and 5 of block 382. These lots were originally bounded on the north by the north boundary of the Helena townsite, as indicated on the plat, but now extend back to the line marked "Fence"; the defendants having each acquired title to the portion of the ground immediately north of his lot extending back to that line, and designated as lot 4. When and how this was effected is not of importance. It appears from the evidence, however, that there has been at some time since the establishment of the Helena townsite a difference of opinion as to the position of its north boundary; some of the surveyors placing it as marked, but the McIntyre survey putting it on the line marked "Fence." The space to the south of the curved line marked "Wall" belongs to lots 6 and 7. These matters are referred to only for the purpose of making clear the condition of the boundaries as they now exist. The space to the east of Harrison avenue, between the public school grounds and the fence line, is an open alley, about which there is no dispute. While the defendants contend that this alleyway extends on through the Shaw addition to its western boundary far beyond the alley running north and

south, the controversy here is over the strip running from Harrison avenue west to this alley, as has heretofore been stated. This is about sixteen feet in width.

The plaintiff contends, first, that there is no substantial evidence tending to show a dedication of this strip of land by any predecessor of his, for that it does not appear that the predecessor by whom it was sought to show a dedication ever was the owner of it. Incidentally, he also contends that the court erred in admitting in evidence two deeds in the deraignment of his title, made by defendants, whereby it was sought to show a dedication by one of his predecessors, and tending to estop him. A second contention is that there is no substantial evidence tending to show such an adverse use by the public as to support the conclusion that the strip has become a public highway by prescription.

We shall not undertake to determine whether the first contention should be sustained. We are inclined to the view that the court should have excluded the two deeds mentioned. This would have left the defendants with no substantial evidence tending to show that the plaintiff was estopped by a dedication by one of his predecessors. But even if we should reach the conclusion that the deeds should have been excluded, and that the other evidence in the record on this branch of the case furnishes no substantial support for the finding of a dedication, we do not think we should disturb the finding of adverse use, for while the evidence on this issue is not entirely clear or as satisfactory as it might be, there is substantial foundation in it to support the finding that there was, for the full period of the statute, prior to 1895, a well-defined line of travel, by such portion of the public as had occasion to use it, over the strip from Harrison avenue to the point where it joins the north and south alley running through block 1, including the defendants who used it for the delivery of supplies to their respective residences. Some of the witnesses testified that the travel over the strip during the years from 1872 to 1895 was in a direct line due east and west with the alley to the east of Harrison avenue, and that

at the time of the trial the evidences of it were still upon the ground, clearly marked, immediately north of the fence in rear of defendants' property. They further testified that during the years up to 1895, when some excavation was made by the city along Harrison avenue, leaving a bank to the east of this strip that temporarily interrupted travel over it, this opening furnished the only line of travel toward the west in that locality. This evidence finds corroboration in the fact, which is not controverted, that the strip to the east of Harrison avenue, and south of the public school grounds, is a public highway and has always been used as such since the townsite of Helena was first platted, and that the fence to the west of lots 1, 2, and 3 has never inclosed the strip so as to prevent travel over it.

Further, the evidence tends strongly to show that the plaintiff never at any time, until shortly prior to the bringing of this action in 1904, attempted to obstruct this travel over or assert ownership of the strip. This evidence is controverted by the plaintiff, but we cannot say that the conclusion of the court is manifestly against the weight of the evidence as a whole. For this reason we do not think that this court should interfere with the finding of the district court. (*Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918.) We are more disinclined to reach the contrary conclusion because of the condition of the record before us. It purports to contain all of the evidence, and it does, so far as it is a transcript of the documents introduced and the statements of the witnesses. Yet, substantial portions of the statements of some of the witnesses are unintelligible, for the reason that they repeatedly refer to points upon the maps and plats introduced, by merely indicating them to the jury by the use of the words "here," "there," etc., without identifying them by marks or letters. Under these conditions, it is impossible to understand the full purport of these statements, and to undertake to say that the trial court did or did not assign to them

proper force and significance would be to a large extent pure conjecture.

We agree with counsel that where, as in this case, it is sought to establish a public highway by prescription, without color of title, by proof of travel over it for the statutory period, the testimony must definitely show a use of the identical strip of land over which the right is claimed, and that travel generally over an uninclosed lot or parcel of ground is not sufficient to establish any right. This rule has been recognized by this court (*State v. Auchard*, 22 Mont. 14, 55 Pac. 361; *Montana Ore Pur. Co. v. Butte & Boston Con. C. & S. Min. Co.*, 25 Mont. 427, 65 Pac. 420), and is recognized by the courts generally (14 Cyc. 1156; Elliott on Roads and Streets, sec. 176). The evidence tends to show that a definite line of travel had been used by the public over this strip in the rear of these lots from 1872 to 1895, and, though this was interrupted by the excavation along the line of Harrison avenue in the year 1895, there is no evidence in the record whatever that the plaintiff ever interfered with or questioned the right acquired by this use, until a short time before the bringing of this action, though he knew of the conditions and that the strip was regarded as a continuation of the alley on the east.

Counsel for plaintiff insists that the judgment and order should be reversed, because, construing the findings as a whole, the finding of adverse use in connection with the finding of the dedication, amounts to nothing more than a finding to the effect that the public had accepted the dedication of the land in question and had continued to use it in a public manner from the time of dedication up to 1895. In this we cannot agree with counsel. Conceding that the evidence upon which the finding of dedication was based was wholly immaterial and would not justify such a finding, there is no basis for the assertion that the evidence does not justify the finding of adverse use. Since the issue of adverse use was tried, and a definite finding made thereon, the correctness of this cannot be affected by the fact

that the court made a finding upon incompetent evidence upon the subject of dedication.

It has been assumed by the parties that the sections of the statute upon which the defendants rely are available as a defense in this case. We have not questioned this assumption, but assumed it to be correct. Whether or not it is we do not decide.

We are of opinion that the judgment and order should be affirmed, and it is so ordered.

Affirmed.

MR. JUSTICE HOLLOWAY, and the HONORABLE T. C. BACH, Judge of the first judicial district, sitting in place of MR. JUSTICE SMITH, who is disqualified, concur.

ON MOTION FOR REHEARING.

(Submitted November 22, 1907. Decided December 3, 1907.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Plaintiff's motion for a rehearing in this case, as we understand it, proceeds upon the assumption that upon appeal to this court in an equity case, the appellant is entitled, if he so desires, to a trial *de novo*. We do not understand that the statute (Code Civ. Proc., sec. 21, amended Session Laws, 2d Extra. Session, 1903, p. 7) requires or permits a review to this extent. While it does require this court "to review all questions of fact arising upon the evidence presented in the record * * * and determine the same," from the very nature of the case, as was pointed out in *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6, and *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918, the review may not go further than to determine whether there is a decided preponderance in the evidence against the findings of the trial court. Though the evidence is presented in question and answer, it is in cold type, without the gestures, behavior or appearance of the witnesses, and often, as in this case, the illus-

trations made by them through the medium of maps, diagrams and other instrumentalities used to make their statements intelligible. It would be manifestly out of place for this court to undertake to try a case and determine it as does the district court.

We concede that when a party relies upon adverse use to establish a right, his evidence must be clear and convincing; but this rule must of necessity apply more directly to the district court. In a given case, what is not as clear and convincing to us as might be, might have been entirely so to the trial judge; at least this presumption attaches to his findings, and this court is not at liberty to overturn them unless there is a clear preponderance against them, after due and proper allowance has been made for the absence from the record of such elements in the evidence as have not been, or cannot be, reproduced therein.

As we stated in the original opinion, much of the testimony of some of the witnesses in this case is unintelligible, for the reason that counsel failed to have them designate by letters or other mode of identification, the points upon the maps and plats to which they referred. If we assign the meaning to this testimony which counsel insist that it should have, we should certainly agree with them and say that the judgment should be reversed. The presumption must obtain, however, that it was understood by the trial court as lending support to defendants' case, and hence that it tended to support the findings as made. Are we justified in saying that it was not clear and convincing to him? We have read and re-read the record carefully in our endeavor to arrive at a just conclusion in this case. We find no suggestion made in the argument accompanying the motion that induces us to think that upon a rehearing we might reach a different conclusion. The motion is accordingly denied.

Rehearing denied.

MR. JUSTICE HOLLOWAY. concurs.

STEPHENS, RESPONDENT, v. ELLIOTT, APPELLANT.

(No. 2,437.)

(Submitted October 10, 1907. Decided October 28, 1907.)

[92 Pac. 45.]

Personal Injuries—Master and Servant—Nonsuit—New Trial—Evidence—Instructions—Judicial Notice—Mortality Tables—Contributory Negligence—Assumption of Risk—Burden of Proof.

Personal Injuries—Nonsuit—When Properly Overruled.

1. A motion for nonsuit made in an action to recover damages for personal injuries by reason of the negligence of plaintiff's employer, was properly overruled, where a *prima facie* case had been made out by plaintiff.

Same—Directed Verdict—When Properly Denied.

2. The denial of defendant's motion for an instructed verdict, in a personal injury case, where the evidence introduced on his behalf, while reasonably clear enough to have entitled him to a verdict, if believed by the jury, was contradictory of that offered by plaintiff, and did not present a case so clear and indisputable as would have justified the giving of the peremptory instruction requested, was not error.

New Trial—Conflicting Evidence—Discretion.

3. Where the evidence is conflicting, a motion for a new trial upon the ground of the insufficiency of the evidence to sustain the verdict, is addressed to the sound, legal discretion of the trial court.

Personal Injuries—Master and Servant—Issues—Proof.

4. Where plaintiff's complaint, in an action to recover damages from his employer for personal injuries, alleged that he was injured while "pursuing his occupation of running a whim" at a mine, evidence that he had been actually employed for a different purpose, to-wit, as a teamster, but had been subsequently put to work running the whim against his protests, was admissible.

Same—Dangerous Machinery—Duty of Master—Instructions.

5. The court, in the action above set forth, correctly charged the jury that, in arriving at a verdict they might take into consideration the fact, if it was a fact, that plaintiff had been employed for a different character of work than that to which he was temporarily put, in order to determine whether the defendant, as master, had discharged his duty toward the servant to instruct him as to the dangerous character of such employment, if they found that such temporary employment was of a peculiarly dangerous character.

Appeal—Evidence—Leading Questions.

6. Where the answer to a question was not at all responsive, and a motion to strike it was not made, error assigned on the overruling of an objection to the question as leading, will not be considered on appeal.

Personal Injuries—Physicians—Demonstrative Evidence—Discretion.

7. It lay within the discretion of the district court to permit a physician, while testifying in a personal injury suit, to make use of the in-

36	92
37	573
38	165
38	363
38	368
36	92
40	9
40	220

jured arm of plaintiff in an endeavor to explain his testimony to the jury, and, nothing appearing that such discretion had been abused, its action will not be disturbed on appeal.

Same—Evidence to Anticipate Defense—Order of Proof.

8. Error cannot be predicated upon the action of the court, in the cause set forth in the foregoing paragraph, in permitting plaintiff to introduce in his case in chief the testimony of a physician to the effect that plaintiff could not simulate the condition which the witness had found upon examination of the injured limb, or its consequences, where the objection was not that the proper order of proof—a matter largely in the discretion of the trial court—was not being followed, but that the testimony was incompetent and irrelevant.

Same—Evidence—Competency and Materiality.

9. Nor was the testimony, above referred to, incompetent and irrelevant, in view of the defendant's testimony tending to contradict plaintiff's contention that since the injury he had not been able to grasp anything with the hand of his injured arm.

Same—Physicians—Demonstrative Evidence—Discretion.

10. It was not error for the court to permit a physician, who had testified that the motor nerves of plaintiff's hand were entirely destroyed by the injury, and that, in sympathy with this condition, the sensory nerves, which control the feeling in the hand, had become so far paralyzed that no feeling remained in the hand, to demonstrate this before the jury by thrusting a hypodermic needle into the back of plaintiff's hand.

Same—Evidence—Mortality Tables—Judicial Notice.

11. In personal injury cases the district court takes judicial notice of standard mortality tables, offered for the purpose of showing the probable expectancy of plaintiff's life, and, if it is satisfied that the one offered is of that character, no further identification is necessary, and it may be read to the jury by an attorney not sworn as a witness in the case.

Same—Jury—Viewing Premises—Discretion.

12. Where, in a personal injury suit, drawings of the machinery, the faulty condition of which plaintiff alleged as the cause of his injury, had been presented to the jury for inspection, and, upon inquiry by the court, the jurors all stated that they understood the situation, the court acted within its discretion when it refused to direct a view of the machinery itself, at a mine a considerable distance from the place of trial.

Same—Master and Servant—Unsafe Machinery—Duty of Master.

13. The fact that defendant, as employer of plaintiff, did not know of defects in a piece of machinery by reason of which an injury was caused to the latter, is immaterial, if, by the exercise of ordinary care, he should have known of them; and, therefore, an instruction was not objectionable because it failed to advise the jury that in order to find for plaintiff they must find that defendant had knowledge of the alleged defects.

Same—Instructions—Contributory Negligence.

14. An instruction, given in the action above, which, if standing alone would have warranted a verdict for plaintiff, even though guilty of contributory negligence, was not erroneous, where in other instructions the subject of contributory negligence had been fully and clearly covered. Instructions should be considered as a whole.

Same—Master and Servant—Contributory Negligence—Instructions.

15. Plaintiff had never been employed about a mine, nor had he ever seen a whim, prior to entering the service of defendant. He had worked

three days when he was injured. He had been employed as a teamster, but was put to work on the whim, under protest that he was inexperienced in this character of work; nor had he received any warning of the dangers incident to running the whim. *Held*, that an instruction that the jury, in determining whether plaintiff was guilty of contributory negligence, might take into consideration his experience or lack of experience in the employment, and his knowledge or lack of knowledge of the dangers incident to running the whim, was correct.

Same—Contributory Negligence—Assumption of Risk—Burden of Proof—Instructions.

16. Instructions, given in an action to recover damages for personal injuries, charging the jury that the burden of proof to establish the defenses of contributory negligence and assumption of risk was upon defendant, were correct, where the evidence on the part of plaintiff did not show, or tend to show, that his negligence contributed to his injury, or that he assumed the risk incident to his employment.

Appeal—Errors—Briefs.

17. Errors specified, but not argued in appellant's brief, will not be considered on appeal.

Appeal—Instructions—Refusal—When not Error.

18. The refusal of an instruction relative to a subject substantially covered by one given, is not error.

Personal Injuries—Instructions—Assumption of Fact.

19. Defendant's requested instruction which assumed a fact directly at issue, to wit, whether plaintiff had been employed for the purpose of running a whim at a mine, whereas plaintiff contended that he had been hired for a different purpose, and put to work at the whim against his protests,—was properly refused.

Appeal from District Court, Madison County; Lew L. Callaway, Judge.

ACTION by Ed. Stephens against Hugh Elliott. From a judgment for plaintiff and from an order denying him a new trial, defendant appeals. Affirmed.

Messrs. Clark & Duncan, for Appellant.

When plaintiff's evidence shows, beyond question, that his own omission to use ordinary care contributed immediately to, or itself caused the injury, a nonsuit should be granted. (*Cummings v. Helena & L. Smelting & Reduct. Co.*, 26 Mont. 434, 68 Pac. 852; *Meyers v. Chicago etc. Ry. Co.* (Mo.), 77 S. W. 149; *Northern Pac. Ry. Co. v. Jones*, 144 Fed. 47; *Manchow v. Zschezsche & Son Co.*, 113 Wis. 8, 88 N. W. 909; *Iowa Gold Min. Co. v. Dufenthaler*, 32 Colo. 391, 76 Pac. 981; *Roul v. Palmer Brick Co.*, 114 Ga. 910, 41 S. E. 40; *Trapasso v. Cole-*

man, 76 N. Y. Supp. 798, 74 App. Div. 33; White on Personal Injuries in Mines, secs. 131, 134; Bailey's Master's Liability, 191.) Where it is apparent from the evidence of plaintiff that he could, by the exercise of ordinary care, have avoided, not only the injury, but the consequences to himself of the negligence of the defendant, even if such negligence was shown, he was not entitled to recover and a nonsuit was properly awarded. (*Barber v. East & W. R. Co.*, 111 Ga. 838, 36 S. E. 50; *Horton v. Vulcan Iron Wks.*, 43 N. Y. Supp. 699, 13 App. Div. 508; *Creswell v. Shirt Co.*, 100 N. Y. Supp. 497, 115 App. Div. 12; *Gahagan v. Boston & L. R. Co.*, 83 Mass. 187, 79 Am. Dec. 724; *New Jersey Ex. Co. v. Nichols*, 33 N. J. L. 434, 97 Am. Dec. 722.)

Where the accident may have arisen from a variety of causes, and any one of which is equally probable, and some of which may be due to defendant's default, while others are due to influences for which he is not responsible, liability is not fixed on defendant. (8 Ency. of Ev., pp. 872, 874; *Pieschel v. Miner*, 30 Misc. Rep. 301, 63 N. Y. Supp. 508; *Chicago C. R. Co. v. Rood*, 163 Ill. 477-485, 54 Am. St. Rep. 478, 45 N. E. 238; *Yerkes v. Sabin*, 97 Ind. 141, 49 Am. Rep. 434; *Case v. Chicago R. I. P. R. Co.*, 64 Iowa, 762, 21 N. W. 30; *Carpue v. London B. R. Co.*, 5 Adol. & El., N. S., 747; *Treadwell v. Whittier*, 80 Cal. 574-582, 13 Am. St. Rep. 175, 22 Pac. 266. 5 L. R. A. 498; *Howser v. Cumberland R. R. Co.*, 80 Md. 146, 45 Am. St. Rep. 332, 30 Atl. 906, 27 L. R. A. 154.)

The court erred in giving to the jury instruction No. 3. (*Cleveland C. C. & St. Ry. Co. v. Butler*, 55 Ill. App. 594; *Georgia R. Co. v. Thomas*, 68 Ga. 744; *Chicago & A. R. Co. v. Mock*, 72 Ill. 141; *Lake Shore & M. S. Ry. Co. v. Pauly*, 37 Ill. App. 203; *Murphy v. Chicago etc. R. Co.*, 38 Iowa, 539; *McCormick v. Chicago etc. R. Co.*, 47 Iowa, 345; *Hackford v. New York Cent. R. Co.*, 6 Lans. 381, 13 Abb. Pr., N. S., 18; *Ribble v. Starrat*, 83 Mich. 140, 47 N. W. 244.)

The court further erred in giving the jury instruction No. 4. (Blashfield on Instructions to Juries, sec. 387; *Pennsylvania*

Canal Co. v. Harris, 101 Pa. St. 93; *Galveston Land & Imp. Co. v. Levy*, 10 Tex. Civ. App. 104, 30 S. W. 504; *State v. Cain*, 20 W. Va. 679; *White v. Thomas*, 12 Ohio St. 312, 80 Am. Dec. 347; *Chicago B. & Q. R. Co. v. Anderson*, 38 Neb. 112, 56 N. W. 794; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391.)

Instruction No. 5 is erroneous, in that it assumes that the plaintiff was not pursuing his occupation when running the whim. The instruction is also misleading in that it assumes that the plaintiff did not know of the alleged defects in the machinery, and that they were not open and obvious, whereas, his own testimony clearly shows that the machinery he was called upon to handle was exposed to plain sight. This exposed machinery, and these known alleged defects were such as to charge him, under his own testimony, with the knowledge of their danger. (White on Personal Injuries in Mines, sec. 201; *Kennedy v. Merremack Paving Co.*, 185 Mass. 442, 16 Am. Neg. Rep. 89, 70 N. E. 437; *Coullard v. Tecumseh Mills*, 151 Mass. 85, 23 N. E. 731; *Prentiss v. Kent Mfg. Co.*, 63 Mich. 478, 6 Am. St. Rep. 320, 30 N. W. 109; *Townsend v. Langles*, 41 Fed. 919; *Archibald v. Cygolf Co.*, 186 Mass. 213, 71 N. E. 315; *O'Keefe v. Thorne* (Pa.), 16 Atl. 737.)

The giving of instruction No. 9 was error. (*Erwin v. St. Louis I. M. Ry. Co.*, 96 Mo. 290, 9 S. W. 577; *George v. Los Angeles Ry. Co.*, 126 Cal. 357, 77 Am. St. Rep. 184, 58 Pac. 819, 46 L. R. A. 829; *Mitchell v. Tacoma R. & Motor Co.*, 9 Wash. 120, 37 Pac. 341; *Lynch v. Metro St. Ry. Co.*, 112 Mo. 420, 20 S. W. 642; 1 Blashfield on Instructions to Juries, sec. 47; *Galveston H. & S. Ry. Co. v. Knippa* (Tex. Civ. App.), 27 S. W. 730; *City of San Antonio v. Porter*, 24 Tex. Civ. App. 444, 59 S. W. 922; *City of Burnham v. Crider* (Tex. Civ. App.), 27 S. W. 419; *Palfrey v. Texas Central Ry. Co.*, 31 Tex. Civ. App. 552, 73 S. W. 411.)

The following cases are to the effect, generally, that where plaintiff's pleading and testimony raise the issue of contributory negligence, it is error to instruct the jury that the burden of proof is on the defendant, without adding the qualification

to the effect that "unless they should find from the plaintiff's own evidence that he was guilty of contributory negligence": *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21; *Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905; *Wall v. Helena S. R. Co.*, 12 Mont. 44, 29 Pac. 721; *Taillon v. Mears*, 29 Mont. 161, 74 Pac. 421; *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871; *Prosser v. M. C. Ry. Co.*, 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814; *Cummings v. H. & L. S. & R. C.*, 26 Mont. 434, 68 Pac. 852; *Nord v. Boston & M. C. C. etc.*, 30 Mont. 48, 75 Pac. 681; *Nord v. Boston & M. C. C. etc.*, 33 Mont. 464, 84 Pac. 1116, 89 Pac. 647; *Creswell v. U. S. Shirt etc. Co.*, 100 N. Y. Supp. 497, 15 App. Div. 12; *Dallas etc. R. Co. v. Spiker*, 61 Tex. 427, 48 Am. Rep. 297; *Missouri etc. R. Co. v. Foreman*, 73 Tex. 311, 314, 15 Am. St. Rep. 785, 11 S. W. 326; *City of Indianapolis v. Cauley*, 164 Ind. 304, 73 N. E. 691; *Cook v. Mo. Pac. Ry. Co.*, 94 Mo. App. 417, 68 S. W. 230; *Durrell v. Johnson*, 31 Neb. 796, 48 N. W. 890; *North Birmingham St. Ry. Co. v. Calderwood*, 89 Ala. 247, 18 Am. St. Rep. 105, 7 South. 360.

Messrs. Kremer, Sanders & Kremer, for Respondent.

The law as set forth in instruction No. 3 is the law as given by the supreme court of this state. (*Johnson v. B. & M. Min. Co.*, 16 Mont. 178, 40 Pac. 298; see, also, *Washington etc. R. R. Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Solomon R. Co. v. Jones*, 30 Kan. 601, 2 Pac. 657; *Hill v. Southern Pac. Co.*, 23 Utah, 94, 63 Pac. 814; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113, 77 Am. Dec. 212.) "In considering alleged error in an instruction, the instructions in the case should be considered together as a whole." (*State v. Rolla*, 21 Mont. 587, 55 Pac. 523; *Cannon v. Lewis*, 18 Mont. 408, 45 Pac. 572; *Crushing v. Quigley*, 11 Mont. 585, 29 Pac. 337; *Schwab v. Owens*, 11 Mont. 482, 29 Pac. 190; *Upton v. Larkin*, 7 Mont. 459, 17 Pac. 728; *Wenner v. McNulty*, 7 Mont. 37, 14 Pac. 643; *Territory v. Hart*, 7 Mont. 502, 17 Pac. 718; *Kennon v. Gilmer*, 5 Mont. 270, 51 Am. Rep. 45, 5 Pac. 847; *Higley v. Gilmer*, 3 Mont. 106, 35 Am. Rep. 450.)

The law as given in instruction No. 4 is absolutely correct; the doctrine there announced having been followed in this and in other western states. (*Hill v. Southern Pac. R. Co.*, 23 Utah, 94, 63 Pac. 814; *Solomon R. Co. v. Jones*, 30 Kan. 601, 2 Pac. 657; *Johnson v. B. & M. Min. Co.*, 16 Mont. 178, 40 Pac. 298; *Bowers v. Union Pac. Ry. Co.*, 4 Utah, 215, 7 Pac. 251; *Prosser v. Montana Cent. Ry. Co.*, 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814; *Higley v. Gilmer*, 3 Mont. 97, 35 Am. Rep. 450; *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21; *Wall v. Helena St. Ry. Co.*, 12 Mont. 56, 29 Pac. 721; *Nelson v. City of Helena*, 16 Mont. 19, 39 Pac. 905.)

That the law presented in instruction No. 5 is sound there can be no doubt, for this doctrine has been followed in Montana. (*Berg v. B. & M. Co.*, 12 Mont. 217, 29 Pac. 545; see, also, *Baxter v. Roberts*, 44 Cal. 190, 13 Am. Rep. 160; *Spelman v. Fisher Iron Co.*, 56 Barb. 165.) The law as laid down in this instruction has been followed almost verbatim, and held good. (*Hill v. Southern Pac. Co.*, 23 Utah, 94, 63 Pac. 814; see, also, *McGowan v. Smelting Co. (C. C.)*, 9 Fed. 861, 3 McCrary 393; 1 Shearman and Redfield on Negligence, sec. 219.)

The plaintiff in this case has shown in his testimony that he was free from contributory negligence, as is strongly evidenced by the refusal of the court to grant a nonsuit upon motion made at the close of plaintiff's testimony, and such being the case, the burden of proving contributory negligence and assumption of risk was upon defendant. (*Appel v. Buffalo etc. R. R.*, 2 N. Y. 257; *Hulehan v. Greenbay etc. R. Co.*, 68 Wis. 520, 32 N. W. 529; *Nadeau v. White R. L. Co.*, 76 Wis. 120, 20 Am. St. Rep. 29, 43 N. W. 1135; *Swoboda v. Ward*, 40 Mich. 420; *Norfolk etc. Co. v. Ward*, 90 Va. 687, 44 Am. St. Rep. 945, 24 L. R. A. 717, 19 S. E. 849.)

Appellant alleges that an employee is not acquitted of the assumption of risk merely because he did not comprehend the danger, and asserts that the test is, whether an ordinary prudent person of his age and experience, under like circumstances,

would have comprehended the risk. We do not believe this to be the true doctrine of the law, but rather whether he understood the danger and whether the danger of the position was explained as was necessary for the protection of one who had no knowledge of it. (*Combe v. New Bedford Cordage Co.*, 102 Mass. 573, 3 Am. Rep. 506; *McDonald v. Chicago etc. Ry. Co.*, 41 Minn. 439, 16 Am. St. Rep. 711n, 43 N. W. 380; *McGovern v. Smelting Co.*, 9 Fed. 861, 3 McCrary, 393; *O'Connor v. Adams*, 120 Mass. 427.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action for damages for personal injuries. The plaintiff was employed by the defendant to work in Madison county. Soon after his employment he was set to work running a whim, used for hoisting ore from the Lehigh mine, owned and operated by the defendant near Norris. On May 6, 1905, while engaged in this business, the plaintiff was injured, and he brought this action to recover damages. The jury returned a verdict in his favor for \$2,500, and from the judgment entered on the verdict and from an order denying him a new trial the defendant has appealed.

At the close of plaintiff's case, the defendant moved the court for a nonsuit, which was overruled, and at the close of all the testimony made a motion for an instructed verdict, which was denied. These rulings of the court, together with the order denying the defendant a new trial, are assigned as erroneous, presenting the question of the sufficiency of the evidence to entitle the plaintiff to recover.

No useful purpose would be served in giving even a brief summary of the evidence. Suffice it to say, we have examined it all and fully concur in the ruling of the trial court in each of the orders above. We think the plaintiff made out a *prima facie* case, which was sufficient to defeat the motion for a nonsuit. And, while the testimony given on behalf of the defendant is reasonably clear, and, if believed by the jury, would have

entitled him to a verdict, it was contradictory of that given on behalf of the plaintiff and presented issues which were properly submitted to the jury. "The defendant's evidence, though contradictory, in some particulars, of that put in by the plaintiff, did not make out a case so clear and indisputable as would have justified the court in giving the peremptory instruction requested." (*Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224.)

A verdict having been returned in favor of the plaintiff, the motion for a new trial upon the ground of the insufficiency of the evidence to sustain it was addressed to the sound, legal discretion of the trial court, which heard the evidence as given from the witness stand, had opportunity to observe the witnesses, and was therefore better qualified to judge of the character of the testimony than this court, and with the order denying a new trial upon that ground we are not inclined to interfere. (*Fournier v. Coudert*, 34 Mont. 484, 87 Pac. 455, and cases cited.)

Exception is also taken to certain rulings of the trial court in admitting evidence on behalf of the plaintiff. It is contended that the court erred in permitting the plaintiff, over objection of defendant, to testify that he was employed by the defendant to work as a teamster, and it is said that this evidence is incompetent and irrelevant under the issues made by the pleadings; and this question is presented, also, by certain instructions given by the court.

The allegation in the complaint is that the plaintiff was injured while he "was pursuing his occupation of running said whim," etc. But we cannot see anything inconsistent between that allegation and plaintiff's contention that he was actually employed as a teamster, but subsequently put to work running the whim against his objections and protests. While actually engaged in running the whim, that was his "occupation," even though he was employed for a different character of work. We think the evidence was properly admitted, and that the court correctly charged the jury that they might take into consid-

eration the fact, if it was a fact, that the plaintiff was employed for a different kind or character of work, but put temporarily at work running the whim, in order to determine whether the defendant, as master, had discharged his duty toward the servant in instructing him as to the dangerous character of such employment, if the jury found that the work of running such whim was of a peculiarly dangerous character. If the jury found that the plaintiff was not employed for this particular work, that he was not a skilled mechanic, that he was ignorant of the machinery which he was required to operate, and that the work of operating it was of a peculiarly dangerous character, and these facts were known to the defendant, or ought to have been known to him, then it was the duty of the employer to give to the employee instructions as to the dangers incident to such employment.

In *Baxter v. Roberts*, 44 Cal. 187, 13 Am. Rep. 160, the rule is announced as follows: "Nor is there any doubt that if the employer have knowledge or information showing that the particular employment is from extraneous causes known to him hazardous or dangerous to a degree beyond that which it fairly imports or is understood by the employee to be, he is bound to inform the latter of the fact or put him in possession of such information. These general principles of law are elementary and firmly established. They are usually applied to cases in which the employee has sustained injury by reason of some defect or unsoundness in the machinery or materials unknown to him about which he is employed to perform labor and of which the employer knew, or might have known in the exercise of ordinary care and vigilance upon his part."

The act of negligence charged against the defendant is his failure to exercise reasonable care in providing plaintiff with suitable and safe machinery with which to work. Among other particular defects in the machinery mentioned is a worn wire cable in which some of the strands are alleged to have been broken and pieces of wire projected from the cable. While plaintiff was testifying in his own behalf, he was asked by his

counsel if the cable was "as smooth as a pencil, or like a new piece of rope." The question was objected to as leading, but the objection was overruled. The answer of the witness was not at all responsive to the question, and, as a motion to strike out the answer was not made, the defendant cannot now complain, and it is unnecessary for us to consider whether in fact the question as formed was leading.

Dr. Fain, who attended the plaintiff at the time of his injury and for some two months thereafter, was permitted by the court, over the objection of the defendant, to make use of plaintiff's injured arm to demonstrate or explain his testimony. The reason urged for the objection is that the testimony already given by the plaintiff was to the effect that other doctors had operated on the injured arm after Dr. Fain ceased to give it his care and before the trial. But, conceding this to be true, we wholly fail to understand how it could affect the testimony of Dr. Fain in so far as his conclusions were based upon facts obtained by him at the time of the injury, or why he could not by the use of the injured arm make his testimony all the more easily understood by the jury. Such an inspection of the injured limb in the presence of the jury is usually permitted; at least, the application to make such inspection is addressed to the sound, legal discretion of the trial court, and its ruling will not be disturbed except for a manifest abuse of such discretion. (*Swift & Co. v. Rutkowski*, 182 Ill. 18, 54 N. E. 1038.) We fail to see wherein the court abused its discretion in this instance. For a very thorough discussion of this subject of autopic proference, see 2 Wigmore on Evidence, chapter 37.

Dr. Bradley also testified on behalf of the plaintiff, although he had never seen the injured arm until two days before the trial. By this witness the plaintiff was apparently attempting to anticipate and refute a theory of defendant that plaintiff was simulating, and that in fact his injuries were not so serious as he claimed, and also to show that the injuries were of a permanent character, as claimed by the plaintiff in his complaint. So far as the testimony given was directed to the

question of plaintiff's simulating, it might have come more properly in rebuttal; but this was not the objection made to it, and, in any event, the order of proof is largely within the discretion of the trial court. (*Campbell v. Rankin*, 2 Mont. 363; *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297.) The objection offered was that it was incompetent and irrelevant, but we are not able to agree with counsel in either of these contentions. The defendant offered testimony tending to show that plaintiff had made exhibitions of the use of his injured arm some time after the accident and had carried a bucket with contents of considerable weight in the hand of his injured arm. The evident purpose of this evidence was to contradict the testimony of plaintiff that since his injury he had not been able to grasp anything with his right hand, and to leave the impression that plaintiff was in fact simulating. As we have said, the logical order of proof probably was not followed; but the testimony of Dr. Bradley that the plaintiff could not simulate the condition which the witness found, or the consequences of such condition, was both competent and relevant.

Dr. Bradley was also permitted to make an experiment, or rather demonstration, before the jury. He testified that the motor nerves of plaintiff's right arm were entirely destroyed, and that in sympathy with this condition the sensory nerves, which control the feeling in the hand, had become so far paralyzed that the plaintiff had no feeling in his hand; and to demonstrate this he was permitted to stick a hypodermic needle into the back of plaintiff's right hand. We cannot see any objection to the order of the court in permitting this demonstration before the jury. That such demonstrations are permitted is quite generally recognized by the courts and text-writers. In *Osborne v. Detroit* (C. C.), 32 Fed. 36, it was held that, where the plaintiff claimed to be paralyzed by a fall, it was not error to permit a medical attendant, who had not been sworn, to demonstrate the loss of feeling on the part of the plaintiff by thrusting a pin into the side of plaintiff claimed to be paralyzed. (See, also, 2 Jones on Evidence, sec. 406, 1 Wigmore on Evi-

dence, sec. 445, and 2 Wigmore on Evidence, sec. 1160, where the subject is treated at length.)

Upon the trial counsel for plaintiff offered and read in evidence, over defendant's objection, certain mortality tables for the purpose of showing the probable expectancy of plaintiff's life. The particular objection urged was that the tables were not identified, but were read by an attorney who was not a witness and not under oath. While there is some conflict in the authorities, the weight of the authorities seems to be in harmony with the trial court's ruling, that the court takes judicial notice of standard mortality tables, and, if the court is satisfied that the one offered is of that character, no further identification is necessary; and it is immaterial that the portion read is read by an attorney who is not sworn as a witness in the case. (17 Ency. of Law, 2d ed., 900; 20 Ency. of Law, 2d ed., 886; *Keast v. Santa Ysabel G. Min. Co.*, 136 Cal. 256, 68 Pac. 771; *Nelson v. Branford L. & W. Co.*, 75 Conn. 548, 54 Atl. 303; *Lincoln v. Power*, above.)

Exception is taken to the refusal of the trial court to permit the jury to be taken to the Lehigh mine for the purpose of inspecting the machinery by which the plaintiff alleged he was injured. Certain drawings of the machinery were presented to the jury, and upon inquiry from the court the jurors all said that they understood the situation. In view of this and the considerable distance which the jury would have been compelled to travel to the mine, we certainly cannot say that the court abused its discretion in refusing defendant's request, and that it was a matter of discretion in the trial court is settled beyond controversy. (*Maloney v. King*, 30 Mont. 158, 76 Pac. 4; Code Civ. Proc., sec. 1081.)

Exception is taken to instruction No. 3 given by the court. It is said that it is erroneous in two respects: First, in that it fails to advise the jury that they must find that the defendant had knowledge of the defects in the machinery of which complaint is made. But that objection is not tenable, for it is immaterial that the master did not know of the defects in

order to hold him liable, if by the exercise of ordinary care he should have known of them. The rule of law is that the master shall exercise reasonable care to provide his servant with reasonably safe appliances with which to work. (*Anderson v. Northern Pac. Ry. Co.*, 34 Mont. 181, 85 Pac. 884.) And this rule, we think, was fully given in the instructions of the court.

Second, it is said that this instruction would have warranted a verdict for plaintiff, even though he was guilty of contributory negligence, and this contention might be justified if this instruction was considered alone; but the instructions should be considered as a whole, and in this case the court very fully and clearly covered the questions of contributory negligence and assumption of risk in instructions 6 and 15, so that the jury could not have been misled by instruction No. 3. And what we have said is equally applicable to one of counsel's arguments against instruction No. 4. In instructions 11 and 12 the jury were told what result should be reached in case they found plaintiff had contributed by his negligence to his own injury, or had assumed the risk. The other objection to instruction No. 4 and the objection to instructions 7 and 8 are based upon a consideration of the evidence, and we must content ourselves with saying that we are not able to give the evidence the same effect which counsel for appellant do.

Instruction No. 5 correctly states the law applicable to this case. It deals with the duty of the master to instruct his servant under certain circumstances such as are presented in this case, under the plaintiff's theory of it. (1 *Labatt on Master and Servant*, Chapter 16.)

Exception is also taken to instruction No. 9, and it is said that this instruction would warrant a verdict in plaintiff's favor, if the jury found that he was inexperienced in handling machinery of the character he was required to handle, even though the jury should find that he was guilty of contributory negligence. We think counsel for appellant misconstrue the language of this instruction. The evidence offered on behalf of plaintiff tended to show that he had never worked around a

mine before; that he had never seen a whim or wire cable before, knew nothing about them, and in fact had worked here for portions of only three days before the day of his injury; that he was employed for other work and engaged in this particular undertaking under protest to defendant's foreman that he was inexperienced in this particular character of work, and did not receive any warning of the dangers incident to such employment. While some of this evidence is disputed by witnesses for defendant, it was nevertheless a proper subject for consideration by the jury. This instruction merely tells the jury that in determining whether the plaintiff was guilty of contributory negligence they might take into consideration his experience or lack of experience in the employment, and his knowledge or lack of knowledge of the risks incident to such employment, and this is clearly correct.

In *Hill v. Southern Pac. Co.*, 23 Utah, 94, 63 Pac. 814, it is said: "And in their [the jury's] deliberations upon this question they had a right to take into consideration his age, inexperience, and any lack of knowledge or understanding of the risks incident to his employment, in the absence of any explanation to him of the dangers connected therewith by his employer. 'After all, it is not so much a question whether the party injured has knowledge of all the facts in his situation, but whether he is aware of the danger that threatens him. What avails it to him that all the facts are known, if he cannot make the deduction that peril arises from the relation of the facts? The peril may be a fact in itself of which he should be informed'"; and see numerous cases cited. When this instruction is read in connection with instructions 6, 10, and 11, we think it is not open to any of the criticisms made upon it.

The answer of the defendant is in effect a general denial of all the material allegations of the complaint, excepting the allegation of plaintiff's employment, and a plea of contributory negligence and one of assumption of risk. By instruction No. 11 the court told the jury that the burden of proof was upon the defendant to establish the defense of contributory negli-

gence, and a like rule was announced with respect to the defense of assumption of risk in instruction No. 17. Appellant contends that these instructions are erroneous, and cites *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21, and later cases, and contends further that the evidence on the part of the plaintiff shows, or tends to show, that his negligence contributed to his injury, and that he assumed the risk incident to such employment. We are not able to make either of these deductions from the evidence offered on plaintiff's behalf, and conclude therefore that the rule announced in *Kennon v. Gilmer* has no application, and that the instructions correctly state the law. (*Nord v. Boston & Mont. Con. C. & S. Min. Co.*, 30 Mont. 48, 75 Pac. 681.)

Instruction No. 14 is criticised upon the ground: First, that it is too complex to be understood; and, second, that it was apt to lead the jury away from a consideration of the question whether the plaintiff contributed to his own injury. Again, we are unable to agree with counsel in either of these contentions. In our view this instruction contains a clear and concise statement. The rule which it announces is, to say the least, as favorable to appellant as he could possibly require.

In appellant's specifications of error, instructions 12 and 18 are mentioned, but no argument is made in the brief upon either of these. No. 18 is mentioned in the body of the brief, but the argument is directed to the giving of No. 17 and is not applicable at all to instruction No. 18.

Exception is taken to the refusal of the trial court to give each of four instructions asked by the defendant. The first of these is erroneous, in that it casts the burden of proof that plaintiff was not guilty of contributory negligence upon him whereas, the court correctly told the jury that the burden of proving the affirmative of that issue was upon the defendant.

There is probably not a correct copy of the second of these offered instructions in this record, since what is printed is wholly meaningless in the first portion of it. If the instruction was

offered in the same form as it appears in the transcript, the court would have erred grievously if it had given it.

The third of these offered instructions covers substantially the same ground as No. 15, given by the court, and for that reason no injury resulted from the court's refusal to give it.

The last of these offered instructions assumes a fact which was directly in dispute, viz.: Was plaintiff employed to run this whim? Plaintiff contends that he was employed as a teamster, and went to work running the whim against his protests, and only for fear of losing employment in case he refused. On the contrary, defendant contends that he employed plaintiff for the very purpose of running this whim. The court properly refused to give this instruction. It is always error for a trial court to assume as a fact a matter which is directly in issue. (*Lindsley v. McGrath*, 34 Mont. 564, 87 Pac. 961.)

Upon the whole record the case appears to have been fairly tried and submitted to the jury under instructions as favorable to the defendant as he could ask.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

Rehearing denied December 7, 1907.

STATE, RESPONDENT, v. PETERSON, APPELLANT.

36 109
36 542

(No. 2,442.)

(Submitted October 12, 1907. Decided November 4, 1907.)

[92 Pac. 302.]

*Criminal Law—Grand Larceny—Definition of “Larceny”—Instructions.***Criminal Law—Definition of “Larceny”—Intent—Instructions.**

1. In a prosecution for grand larceny, the court gave a definition of “larceny” in the language of section 880 of the Penal Code. The jury were further told that in every crime or public offense there must exist a union or joint operation of act and intent. It further charged that to find the defendant guilty it was sufficient to show that he had appropriated the property mentioned in the information “without color of right or authority.” *Held*, that these instructions were erroneous, for the reason that they omitted the element of felonious or criminal intent.

Same—Intent—Instructions—Curing Error.

2. The error, committed in charging that the defendant, accused of grand larceny, could be found guilty if he appropriated the property “without color of right or authority,” was not cured by the addition of the words “and with intent to steal the same,” since the word “steal” could not have been understood by the jury as having any broader import than that given to the term “larceny” by the court in the instruction referred to in the above paragraph.

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

JOHN W. PETERSON was convicted of grand larceny, and from the judgment and an order denying him a new trial he appeals. Reversed and remanded.

Mr. Thos. D. Long, for Appellant.

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General, for the State.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

John W. Peterson was convicted of the crime of grand larceny and sentenced to imprisonment to the penitentiary for a

term of ten years. From the judgment and an order denying him a new trial, he has appealed.

Numerous specifications of error are made in appellant's brief, but it will be necessary to notice but a few of them. For a definition of "larceny," the trial court, in instruction No. 3, gave section 880 of the Penal Code, and, for a definition of "grand larceny," undertook to give section 883 of the same Code, as amended by an Act of February 23, 1897 (Laws 1897, p. 247). In instruction No. 11, the court said: "So, in this case, in order to find the defendant guilty, you must find that he appropriated the property mentioned in the information without color of right or authority, and with intent to steal the same." In instruction No. 6, the court told the jury that, "in every crime or public offense, there must exist a union or joint operation of act and intent, or criminal negligence."

Appellant now contends that the court erred in failing to tell the jury that the intent mentioned in instruction No. 6 must be a criminal intent, and, in No. 11 above, left the jury free to find the defendant guilty of grand larceny, even though he committed a naked trespass. It is said that nowhere in the entire charge was the jury instructed that the defendant must have committed the acts charged against him with a felonious intent. So far as instructions 3 and 6 are concerned, it must be conceded that they are insufficient for that purpose; but on behalf of the state it is claimed that, taken in connection with No. 11 above, these instructions sufficiently cover the subject of criminal intent. It is said that, if the defendant appropriated the property (\$7,000) belonging to the Bank of Somers, without color of right or authority, and with the intent to steal the same, he is guilty of grand larceny.

In *State v. Rechnitz*, 20 Mont. 488, 52 Pac. 264, this court referred with approval to the opinion in the case of *McCourt v. People*, 64 N. Y. 583, wherein it is said: "Every taking by one person of the personal property of another, without his consent, is not larceny; and this, although it was taken without right, or claim of right, and for the purpose of appropriating

it to the use of the taker. Superadded to this, there must have been a felonious intent, for without it there was no crime. It would, in the absence of such an intent, be a bare trespass, which, however aggravated, would not be crime. It is the criminal mind and purpose going with the act which distinguishes a criminal trespass from a mere civil injury. (1 Hale's Pleas of the Crown, 509.)" Under this doctrine, which is generally accepted, it was error for the court to charge that it was sufficient to show that the defendant appropriated the property without color of right or authority. (2 Clark & Marshall on Law of Crimes, secs. 326-328.)

Do the words "and with intent to steal the same" cure the defect? We think not. In *State v. Sloan*, 35 Mont. 367, 89 Pac. 829, the trial court, in instruction No. 14, said: "It devolves upon the prosecution in this case to prove, as an independent fact, beyond a reasonable doubt, that the property alleged in the information was taken and carried away from the possession of the owner by the defendant with an intent then and there to steal the same." Commenting upon this instruction and another giving a definition of "grand larceny," which comprised the substance of sections 880 of the Penal Code, and 883, as amended, above, this court said: "This definition does not include the element of felonious or criminal intent, nor is it aided in this respect by appropriate language expressive of this idea in other parts of the charge. It is true the words 'larceny' and 'steal' are both used in paragraphs 13 and 14 of the charge, and elsewhere, but it is apparent that they are used synonymously, and, since they are referable for the sense in which they were used to the court's definition of the term 'larceny,' they could not have been understood by the jury as having any broader import than is given to the term 'larceny' in the definition."

These cases are determinative of the contention that the trial court erred in authorizing the jury to find the defendant guilty of grand larceny without an instruction that proof of a felonious intent was necessary. That it is incumbent upon the trial

court to instruct the jury, in a grand larceny case, that the taking or appropriation must have been done with a felonious intent on the part of the defendant, was distinctly called to the attention of the bench and bar of this state nearly ten years ago, in *State v. Rechnitz*, above, and by this time it ought to be understood that a failure on the part of the trial court to do so will work a reversal of a judgment of conviction in such a case, as it did in *State v. Rechnitz*, *State v. Sloan*, above, *State v. Allen*, 34 Mont. 403, 87 Pac. 177, and *State v. McLeod*, 35 Mont. 372, 89 Pac. 831.

The definition of "grand larceny," given in this instance, is not correct. Section 883, above, as amended, is not correctly copied.

We have not deemed it necessary to examine the testimony; but, in any event, we doubt the propriety of giving an instruction in the language of No. 18, given in this case.

For the reasons stated, the judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STATE, RESPONDENT, v. PHILLIPS, APPELLANT.

(No. 2,441.)

(Submitted October 12, 1907. Decided November 4, 1907.)

[92 Pac. 299.]

Criminal Law—False Pretenses—Attempt—Information—Sufficiency—Instructions.

False Pretenses—Attempt—Elements—Information—Sufficiency.

1. The crime of attempting to obtain money by false pretense is complete whenever the false representation is made, with the requisite criminal intent, under such circumstances that, if the thing of value had been obtained, a deprivation would have been the result; the information need not, therefore, allege that the person attempted to be defrauded believed the representation, nor that the fraud was completed.

Same—Information—Sufficiency.

2. An information charging an attempt to obtain money by false pre-

tenses, which alleged that defendant willfully, unlawfully and falsely pretended to one P., residing in Massachusetts, and to the manager of a telegraph office, that he was a brother of P., and did then and there send a telegram to said P. asking for \$100 to enable him to return home, and that he was ill, with intent to cheat and defraud, etc., "whereas defendant then knew that said pretenses were false," and that "by color and means of said false pretenses," etc., he attempted to obtain from P. and others said sum of money, by fair intentment negatived the truth of the representation made by defendant that he was the brother of P. (Mr. Chief Justice Brantly dissenting.)

Same—Pleadings—Fraud.

3. While in pleading fraud the facts constituting it, and not the legal conclusion, must be stated, it is not necessary that all of the facts be set forth in detail, but if the ultimate probative facts are stated, it is sufficient.

Same—Information—Sufficiency.

4. The charge in the information referred to in paragraph 2 above, that defendant willfully, unlawfully, and falsely pretended to P. that he was his brother, etc., sufficiently set forth the facts constituting the attempted fraud, even though it be assumed that the pleader intended to allege that the fraudulent representations were made by means of a telegram, but failed to so state in appropriate terms. (Mr. Chief Justice Brantly dissenting.)

Same—Information—Sufficiency.

5. Nor was the above information objectionable on the ground that it did not contain a statement of facts constituting the offense in ordinary and concise language, so as to enable a person of common understanding to know what was intended to be charged, or that it was not direct and certain in its statements, as required by sections 1832 and 1834 of the Penal Code. (Mr. Chief Justice Brantly dissenting.)

Same—Information—Immaterial Allegations—Prejudice.

6. Even though the information above was defective in form, and contained many immaterial averments, these objections could not have prejudiced the defendant, and were insufficient to work a reversal, under the provisions of sections 1842, 2600 and 2320 of the Penal Code. (Mr. Chief Justice Brantly dissenting.)

Same—Instructions—Refusal—Evidence—Record.

7. In the absence of the evidence from the record on appeal in a criminal cause, the refusal to give a requested instruction will not be held erroneous, unless such refusal was error under any supposable state of facts which might have been presented by the evidence.

Same—Precautionary Instruction—Discretion.

8. In a prosecution for crime it is discretionary with the trial court to give, or refuse, an instruction cautioning the jury as to the duty of each member thereof not to vote for a verdict of guilty, if he entertain a reasonable doubt, merely because a majority should be in favor of such a verdict, and not to yield his conscientious convictions as to the guilt or innocence of the accused to the will of the majority for the sake of humanity or to prevent a mistrial.

Instructions—Refusal—When not Error.

9. Refusal of instructions relative to subjects sufficiently covered by those given is not error.

DAVID PHILLIPS was convicted of an attempt to obtain money by false pretenses, and appeals from the judgment of conviction. Affirmed.

Mr. J. L. Staats, for Appellant.

The information does not state facts sufficient to constitute a public offense. In a charge of this kind, the information should specifically negative every false pretense charged against the defendant. The most that can be said is that the information here negatives (but only by inference) the representation of appellant that he was a brother of Charles Phillips, but it does not negative specifically any of the statements made as charged, whether contained in the telegram or out of it. This should be done in all cases of this character. (*State v. Palmer*, 50 Kan. 318, 32 Pac. 29; *State v. Mesch*, 37 Kan. 222, 15 Pac. 251.) The facts constituting the alleged fraud are not sufficient in the information. In all cases, civil and criminal, the facts constituting the fraud must be set out, they must of themselves be legally sufficient to effect a fraud. This doctrine is elementary, and no authorities need be cited to support it. Moreover, the statute requires that the facts charged must be direct and certain as regards the particular circumstances of the offense charged. (Pen. Code, sec. 1834; *People v. McKenna*, 81 Cal. 158, 22 Pac. 488; *People v. Mahoney*, 145 Cal. 104, 78 Pac. 354; and cases cited.)

Where requested instructions correctly declare the law, and have not been otherwise given, they should be given especially in criminal cases. (*People v. Williams*, 17 Cal. 143.) In *People v. Ramirez*, 13 Cal. 173, the court held that correct instructions, requested, should have been given, even where otherwise given.

The form of the verdict was guilty in manner and form as charged in the information. The verdict cannot rise higher than its source, which indeed must of necessity derive its life and validity from the information itself. If the verdict of the jury is uncertain, it will not support the judgment. (*State v. Coon*, 18 Minn. 518 (Gil. 464).) In this case the information is no aid in determining by what false pretenses the defendant was found guilty of fraud in attempting to obtain money by false pretenses. (*People v. Cummings*, 117 Cal. 497, 49 Pac.

576.) It is also uncertain for what offense the jury found appellant guilty. If the verdict is insufficient to support the judgment, the court was in error in pronouncing judgment at all against the appellant. (*People v. Cummings, supra; State v. Coon, supra.*) Moreover, where the facts alleged in the information are not sufficient to constitute a public offense, the judgment is absolutely void. (*Ex parte Kearny*, 55 Cal. 212; *Matter of Corryell*, 22 Cal. 178; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *Ex parte Siebold*, 100 U. S. 371; 25 L. Ed. 717.)

Mr. Albert J. Galen, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant, charged by information with an attempt to obtain money by false pretense, was found guilty. He has appealed from the judgment of conviction. He alleges that he was prejudiced by the action of the court in overruling his demurrer to the information, and refusing to submit to the jury several instructions requested by him.

The charge in the information is stated as follows: "That on or about March 7, 1906, at the county of Gallatin, state of Montana, said David Phillips then and there willfully, unlawfully, feloniously, and deceitfully falsely pretended to one Charles Phillips, of New Bedford, Massachusetts, and to one Mary G. Jones, manager of the Western Union Telegraph office, of Bozeman, Montana, that he, the said David Phillips, was David Phillips, a brother of said Charles Phillips of New Bedford, Massachusetts; that he, the said David Phillips, did then and there, and thereupon, send a telegram from and through said Western Union Telegraph office at Bozeman, Montana, addressed to the said Charles Phillips, which telegram reads in words and figures as follows, to-wit:

“ ‘Mar. 7, 1906.

“ ‘Charles Phillips,

“ ‘New Bedford, Mass.

“ ‘Telegraph me, waiving identification, hundred dollars.
Sick. Coming home. Answer.

“ ‘DAVID PHILLIPS.’

—and did then and there and thereby attempt and endeavor to unlawfully obtain from said Charles Phillips, Mary G. Jones, David Phillips of Pony, Montana, Western Union Telegraph Company, and others money in the sum of one hundred dollars (\$100), and of the value of one hundred dollars (\$100), of the personal property of the said Charles Phillips, with intent then and there to cheat and defraud the said Charles Phillips, Mary G. Jones, David Phillips, Western Union Telegraph Company, and others out of the said sum of money, whereas, said David Phillips then knew that said pretenses were false and that, by color and means of said false pretenses, said David Phillips did then and there knowingly, designedly, feloniously, and unlawfully attempt to obtain from said Charles Phillips, Mary G. Jones, David Phillips, Western Union Telegraph Company, and others the said sum of \$100 in money, of the value of \$100, with intent to cheat and defraud the said Charles Phillips, Mary G. Jones, David Phillips, Western Union Telegraph Company, and others.”

It is argued that the facts stated do not constitute a public offense, in that there is no averment that the pretense or representation made by the defendant was not true. Evidently the representation which the pleader intended to allege as the means by which the fraud was attempted was that the defendant was the brother of Charles Phillips.

In *Territory v. Underwood*, 8 Mont. 131, 19 Pac. 398, an indictment for obtaining money under false pretenses, found under a section of the criminal laws of the territory (Comp. Stats. 1887, Div. 4, sec. 199), which is substantially the same as section 933 of the Penal Code, it was pointed out that it was necessary to allege (1) a false pretense or representation; (2) that

it was made for the purpose of defrauding some person or corporation; (3) that the representation was not true; (4) that it was believed by such person; and (5) that the person was defrauded out of something of value, naming it and its value. In this case the offense was not complete. The charge is an attempt to commit the crime. Hence it was not necessary to allege that the person upon whom the fraud was attempted believed the representation, for it is immaterial whether he believed it or not. The crime of attempting to obtain money by a false pretense is complete whenever the false representation is made, with the requisite criminal intent, under such circumstances that, if the thing of value had been obtained, a deprivation would have been the result. In charging the attempt, therefore, the averments of belief and completion of the fraud are not essential. Otherwise the averments enumerated are essential.

Does the information here by fair intendment negative the truth of the representation made by the defendant that he was the brother of Charles Phillips? The language is: "Whereas said David Phillips then knew that said pretenses were false." By fair intendment this means that the representation was false, and that the defendant knew this to be so. This negation is aided by the additional expression, "And that by color and means of said false pretenses," etc. While the information is not a model in this respect, we think the traverse is sufficient.

Again, it is argued that the facts constituting the attempted fraud are not stated in sufficient detail. It is an elementary rule that, in pleading fraud, the facts constituting it, and not the legal conclusion, must be stated. But this does not require all of the facts to be set forth in detail, but only the ultimate probative facts. It is sufficient if the allegation be such as that a denial of it will present an issue as to its truth and require proof to establish it. Eliminating the averments touching the sending of the telegram, the charge is that the defendant willfully, etc., falsely pretended to Charles Phillips that he was his brother, etc. This alleges an issuable fact, and is sufficient,

even though it be assumed that the pleader intended to allege that the representations were made by means of the telegram, but failed to use appropriate terms.

It is said that the information does not substantially conform to the requirements of section 1832 of the Penal Code, for that it does not contain a statement of facts constituting the offense, in ordinary and concise language, so as to enable a person of common understanding to know what is intended. What has already been said is sufficient to dispose of this contention. It is true that it is alleged that the representation was made to both Charles Phillips and Mary G. Jones. It is also alleged that the purpose was to defraud both of these persons, and also David Phillips, of Pony, Montana, the Western Union Telegraph Company, and others. The purpose of the statute is to require such a statement of the charge that the defendant may know what he has to meet and so be able to prepare his defense. The information notified him of the fact that he had made a false representation to both the first-named persons, with intent to defraud them, as well as the others named and unnamed. It could do him no harm if the charge was not sufficiently specific to enable the state to offer proof of the averments as to the other persons. It was clear that he must meet the one charge as to Charles Phillips. It is sufficiently direct and certain as to this specific charge. It also sets forth the particular circumstances with sufficient detail to meet the requirements of section 1834 of the Penal Code. As before remarked, the information is certainly not a model. It is defective in form, and contains many averments that are immaterial; but these objections are not fatal, since it is apparent that they could not prejudice the defendant. (Pen. Code, secs. 1842, 2600, 2320.)

Counsel requested that the court instruct the jury that if they believed that the defendant sent the telegram set out in the information in good faith, believing that he had a brother by the name of Charles Phillips residing at New Bedford, Massachusetts, they should acquit him. The court denied the re-

quest. It is said that this was error. Under a supposed condition presented by the evidence, this instruction would have been proper and should have been given, for under this condition of facts the criminal intent would have been wanting; but since the evidence is not before us, we are not able to say that the condition presented by it rendered such an instruction necessary. We cannot say whether the defense was that the representation was not in fact made, or whether it proceeded upon the theory that it was the result of an honest mistake. In the former case such an instruction would not have been applicable. Therefore, under the rule repeatedly recognized by this court, that, in the absence of the evidence, instructions may not be held erroneous unless they appear to be so upon any supposable state of facts which might have been presented by the evidence, we may not say that the refusal of this instruction was error. (*State v. Gawith*, 19 Mont. 48, 47 Pac. 207; *State v. Gill*, 21 Mont. 151, 53 Pac. 184; *State v. Mason*, 24 Mont. 340, 61 Pac. 861; *State v. Kremer*, 34 Mont. 6, 85 Pac. 736.)

The court refused the request of the defendant to give the following instructions:

“(a) If, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so voting, for the single reason that a majority of the jury should be in favor of a verdict of guilty.

“(b) You are instructed that your verdict must be unanimous, and that each juror should decide for himself upon his oath, from the law as given you by the court and the evidence in the case, as to what his verdict should be. No juror should yield his deliberate, conscientious convictions as to the guilt or innocence of the defendant, either at the instance of the majority of the jury for the sake of unanimity, or to prevent a mistrial; but you are further instructed that nothing in this instruction is to be taken to mean that you shall not fully and fairly discuss among yourselves all the evidence and facts sur-

rounding the case, as disclosed by the evidence, or that any of your number shall not be open to conviction by fair, honest argument, by any member or members of the jury, founded upon the evidence produced at the trial and the law as given you by the court."

It is argued that this was prejudicial error. The necessity of giving such a precautionary instruction was considered by this court in *State v. Hurst*, 23 Mont. 484, 59 Pac. 911. It was there held that it was discretionary with the trial court, under the circumstances of the particular case, whether such an instruction should be given. This was approved and followed in *State v. Howell*, 26 Mont. 3, 66 Pac. 291. Some courts hold that the jury should be so cautioned whenever requested by the defendant, and that a refusal to do so is prejudicial error. This is apparently the rule in California. (*People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581.) It has been declared to be the rule by the courts of Kansas and Indiana. (*State v. Witt*, 34 Kan. 488, 8 Pac. 769; *Castle v. State*, 75 Ind. 146.) In Iowa it is held that the usual mode of instructing is sufficient, since the jurors may be presumed to know their duty and act accordingly. (*State v. Hamilton*, 57 Iowa, 596, 11 N. W. 5.)

Upon further consideration of the subject, we are of the opinion that the rule announced in *State v. Hurst* and *State v. Howell* is the better one. The instructions requested declare the law correctly. Of course, it is the duty of each juror to decide for himself, and not to yield to a majority, and agree to a verdict of guilty, so long as he entertains a reasonable doubt; but, if there is any one thing which the average American citizen understands, it is that he has a right to his own opinion, and that he may disagree with his fellows. He fully understands that it is his duty, as well as his right, to be governed by his own convictions under his oath. He understands, also, that a verdict is the result of the concurrence of individual judgments, and that he should not set aside and disregard the dictates of his own conscience simply because they do not co-

incide with those of his associates. Further, when the jurors are sworn, they are sworn individually, and not collectively, each one promising on his oath that he will a true verdict render according to the evidence. Again, the instructions are addressed to the jurors individually, as well as collectively. Such being the case, there can be no presumption that each individual juror will not understand that he has his own duty to perform, without regard to what may be the convictions of others. The danger that some weak juror may yield to the majority is thus minimized. Finally, the defendant may satisfy himself that the verdict is the verdict of each juror by calling for a poll; but even then, if any juror has been weak enough to surrender his judgment to the majority, he will answer in conformity with his vote in the jury-room. After all, since a verdict cannot be impeached by the affidavits of the jurors, except when it is the result of chance or other like means, there is no way of ascertaining whether the instruction has proved effective. It is better to leave the whole matter to the discretion of the trial judge, who sees the individual jurors, and can judge of their respective capacities. In any event, it is going too far to adopt a rule which implies that, if the defendant sees fit in his discretion to request such an instruction, it must be given or the verdict cannot stand.

Two other requests for special instructions were refused. We doubt if one of these instructions has been correctly copied in the record. If so, one sentence in it is unintelligible. However this may be, both instructions are sufficiently covered by the instructions given. Consequently the refusal to give them was not error.

Finally, it is contended that the verdict is not sufficiently definite, and that the court erred in rendering judgment upon it. We think there is no merit in these contentions.

In the foregoing opinion, I have written the views of my associates upon the questions presented by the demurrer. I do not concur in the conclusion stated on this branch of the case. I think the averments are so indefinite and uncertain that they do

not meet the requirements of the statute (Pen. Code, sec. 1832), that the statement of facts constituting the offense must be made in such a manner as to enable a person of common understanding to know what is intended. I do not think it can be understood from them with any degree of certainty exactly what the pleader meant; whether he meant to charge that the representation made to Charles Phillips, of New Bedford, Massachusetts, was made verbally or in writing, other than the telegram, directly, or whether it was made by means of the telegram alone, Mary G. Jones being the intermediary only. While it is not necessary to allege the means by which the representation is made, yet the allegations as a whole are so framed as to leave the defendant to guess as to what the state expected to prove in this connection. Further, they lack directness and certainty in setting forth the particular circumstances of the offense charged. (Pen. Code, sec. 1834.) Taking them all together, they fairly permit the inference that the pleader intended to allege that the defendant, knowing that Charles Phillips, of New Bedford, Massachusetts, had a brother residing in Montana, named David Phillips, represented to Charles Phillips that he, the defendant, was such brother, that he was ill and needed aid in order that he might return home to Massachusetts, whereas, in fact, such representation was false and known to the defendant to be so when it was made. That these were the particular circumstances of the offense is inferable from the fact that Charles Phillips was in Massachusetts and the defendant in Montana, else the telegraph would not have been resorted to. If such were the case, the facts constituting the attempted fraud are not sufficiently alleged. In these respects I think the information insufficient. In the other conclusions stated in the opinion I concur.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

**COLLINS, ADMINISTRATOR, APPELLANT, v. MCKAY ET AL.,
RESPONDENTS.**

(No. 2,322.)

(Submitted October 1, 1907. Decided November 4, 1907.)

[92 Pac. 295.]

***Quieting Title—Mines—Uncertainty of Description—Lost Monu-
ments—Transactions with Deceased Persons—Witnesses—Com-
petency—Declarations—Deeds—Identification of Property—
Parol Evidence.***

**Administrators—Quieting Title—Transactions with Deceased Persons—
Witnesses—Competency.**

1. Where defendants, in a suit brought by plaintiff, as administrator, to quiet title to certain portions of mining property, claimed title under deeds of grant from plaintiff's intestate and prayed that their titles be quieted as against the estate represented by plaintiff, they were simply attempting to protect themselves against the claims and demands of plaintiff, and were not asserting "a claim or demand against the estate" of deceased, so as to make them incompetent to testify, under the provisions of Laws of 1897, page 245, as to any matter of fact occurring before their grantor's death.

Same—Character of Action—How Determined.

2. Defendants in a suit of the character set forth in the above paragraph, are entitled to such relief as their proof warrants, and the character of the action may not be determined from a casual remark of either court or counsel during trial, but must be arrived at from the pleadings.

Mining Property—Deeds—Effect—Identification of Property.

3. Under Civil Code, sections 1511 and 1512, a deed purporting to transfer a portion of a lode claim (naming it), located for the purpose of protecting a placer claim from possible adverse claimants prior to procurement of patent for the latter, conveyed such portion of the afterward patented placer claim, lying within the exterior boundaries of the lode claim, as could be identified; and it was immaterial whether the lode location was a valid one as against others or not.

Same—Identification—Name.

4. If a portion of a mining claim can be identified as that intended to be conveyed, it is immaterial by what name the claim itself was designated in the deed.

Quieting Title—Uncertainty in Description—Declarations.

5. In a suit by an administrator to recover real property, claimed by defendants under deeds of grant from plaintiff's intestate, for alleged uncertainty of description, declarations of defendant's grantor relative to the title conveyed and the location of the portions transferred, were admissible against the administrator.

Real Property—Lost Monuments—Parol Evidence.

6. Where monuments or marks called for in a deed are lost or otherwise uncertain, their location may be proved by parol evidence.

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

ACTION by J. P. Collins, as administrator of the estate of Charles Colbert, deceased, against Alex. J. McKay and others. From a decree in favor of defendants, and from an order overruling the plaintiff's motion for a new trial, he appeals. Affirmed.

Mr. Albert J. Galen, Attorney General, and Mr. C. F. Kelley, for Appellant.

Where boundaries have been completely obliterated, and nothing remains by which one can show where they originally were, it is entirely without the province of a court to assume the hazard of guessing at a description of the premises, and by injecting the same into a decree create property rights, irrespective of the intent of the parties. That such a description renders a deed void, see 4 Am. & Eng. Ency. of Law, 802; Devlin on Deeds, secs. 1010, 1011, and cases cited; *Tryon v. Huntoon*, 67 Cal. 325, 7 Pac. 741; *In re California College*, 1 Cal. 330; *Moore v. Wilkinson*, 13 Cal. 478.

The statements made by the witness Barker and all the evidence offered was merely hearsay in character. That the declarations of Burton to Barker are inadmissible, see Code Civ. Proc., sec. 3121; Wigmore on Evidence, sec. 1361 et seq.; 1 Greenleaf on Evidence, secs. 98, 99. That a similar declaration made by a surveyor to a witness is hearsay, and should be excluded, see *Beecher v. Galvin*, 71 Mich. 391, 39 N. W. 469; *Titterton v. Trees*, 78 Tex. 567, 14 S. W. 692.

Under the provisions of section 3162 of the Code of Civil Procedure, as amended by Session Laws of 1897, at page 245, the witnesses were testifying as to alleged conversations taking place between themselves and the deceased Colbert. (*Blood v. Fairbanks*, 50 Cal. 420; *Chase v. Evoy*, 51 Cal. 618; *Moore v. Schofield*, 96 Cal. 486, 31 Pac. 532; *Whitney v. Fox*, 166 U. S. 637, 17 Sup. Ct. 713, 41 L. Ed. 1145; s. c., 8 Utah, 380, 32 Pac.

49; *Rice v. Ridgley*, 7 Idaho, 115, 61 Pac. 290, 294; and cases cited in Wigmore on Evidence, sec. 578; *Delmoe v. Long*, 35 Mont. 139, 88 Pac. 778.)

Messrs. McBride & McBride, and *Mr. James E. Murray*, for Respondents.

Boundaries may be shown by oral testimony. It is also admissible to show where the monuments originally stood when they are lost, or their location is uncertain. (*House v. Jackson*, 24 Or. 89, 32 Pac. 1027; *Ferris v. Coover*, 10 Cal. 624; *Colton v. Seavey*, 22 Cal. 496; 4 Am. & Eng. Ency. of Law, 850.) Where monuments can be identified there is a conclusive presumption that the lines are where they indicate. (2 Ency. of Ev. 711, and authorities cited.) It is not the office of a description to identify the premises, but to furnish the means by which they can be identified. (*Rucker v. Steelman*, 73 Ind. 396; *Ames v. Lowrey*, 30 Minn. 283, 15 N. W. 247; *Smiley v. Fries*, 104 Ill. 416; *Sengfelder v. Hill*, 21 Wash. 371, 58 Pac. 250.)

Section 3162 of the Code of Civil Procedure has in contemplation the protection of the estate against unfounded claims made and prosecuted against the estate or the representative of the deceased person, and does not in any manner affect the defense of a claim made by the representative of the deceased person. (1 Wigmore on Evidence, sec. 578; *Owens v. Owens*, 14 W. Va. 88; *St. John v. Lofland*, 5 N. Dak. 140, 64 N. W. 930; *Sedgwick v. Sedgwick*, 52 Cal. 337; *Poulson v. Stanley*, 122 Cal. 655, 68 Am. St. Rep. 73, 55 Pac. 606; see, also, *Rapley v. Klugh*, 40 S. C. 134, 18 S. E. 680.)

MR. JUSTICE SMITH delivered the opinion of the court.

These are appeals from a decree in favor of the defendants, entered by the district court of Silver Bow county, and from an order overruling plaintiff's motion for a new trial.

The plaintiff brings the action as administrator of the estate of Charles Colbert, deceased, claims ownership of the Emery placer mining claim, and seeks to quiet the title of the estate to the ground included within the exterior boundaries of said mining claim as against the several defendants. The administrator alleges that in his lifetime the deceased, Colbert, "made final entries and purchase in the United States land office at Helena of the Emery placer mining claim, designated as United States mineral surveys Nos. 996 A, B, and C, situated in Silver Bow county, and on the — day of August, 1899, and the — day of May, 1903, patents therefor issued to the said Colbert," and by virtue thereof Colbert and his heirs became and are the owners in fee simple of the said Emery placer mining claim. He then alleges that the defendants claim an estate or interest in the land adverse to the estate of the plaintiff.

The defendants, William and Catherine Burton answered, in substance, as follows: That on or about the twenty-first day of June, 1888, the said Colbert and the-defendant William Burton desired to procure United States patent for a tract of ground in Silver Bow county, which is now included within the boundaries of amended surveys Nos. 996 A and C, Emery placer mining claim, and on that date, for the purpose of procuring and perfecting title to the ground, the said Colbert and Burton located a quartz lode mining claim, called the "Protection lode claim," covering ground particularly described in the answer, and did on the day named discover within the limits of the claim a vein, etc.; that they located the same, reciting the successive steps, and filed their declaratory statement in the office of the county recorder. They then proceed to aver: "That by said location it was intended by the parties thereto, and was so recognized by the said Colbert in his lifetime, that the ground included within the exterior boundaries of the said Protection lode claim, and all rights appurtenant thereto or obtained by virtue of such location, should be and were owned by the said Colbert and Burton, share and share alike; each of said parties owning and claiming to own an undivided one-half interest in and to

the said Protection lode mining claim and the ground included within the exterior boundaries thereof, the said location having been made for the purpose of procuring title to the said ground from the United States and not otherwise." That on July 2, 1889, Colbert, by deed, granted to Burton all of his right, title and interest in the east six hundred and sixty feet of ground included within the exterior boundaries of the Protection lode claim, which said six hundred and sixty feet of the Protection claim includes within its boundaries a portion of the Emery placer, which is described by metes and bounds in the answer as containing two and ninety-six hundredths acres. That by the same deed Colbert conveyed and granted to Burton a parcel of land sixty by two hundred feet in the northwest corner of the exterior boundaries of the Protection claim, being also a portion of the Emery placer. The last piece of ground is described in the answer as follows: "Commencing at corner No. 1 of amended survey No. 996 A, which is also the northwest corner of said Protection lode claim, running thence N. 88' E. 60 feet, thence south 200 feet, thence S. 88' W. 60 feet, thence north 200 feet, to the place of beginning." That on June 12, 1889, Burton and wife, "with the full knowledge and consent of Charles Colbert," conveyed and granted to the defendant Alex. J. McKay an undivided one-fourth interest in the Protection claim. That on June —, 1889, Burton and wife conveyed to McKay the surface of the north one hundred feet of the strip described as being 60x200 feet in dimension,—and on August 10, 1889, they conveyed the surface of the balance of the strip to one John Stanley. That these last conveyances were made with the knowledge and consent of Colbert, who actually, in company with Burton, placed the grantees in possession of the ground. That said grantees and their successors have been in the open, notorious and continuous possession of the ground conveyed ever since, and their title and right of possession were always recognized by Colbert in his lifetime. That the Protection claim was duly represented each year from 1888 to 1898, the expense of representing being borne jointly by Colbert, Burton and McKay.

This answer then proceeds: "That by reason of the location of the Protection quartz lode mining claim and the protection given to the said ground thereby from possible adverse claimants, the said Charles Colbert, with the full knowledge and consent of William Burton, and pursuant to an agreement by and between the defendant Burton and the said Colbert, that all proceedings looking toward the procuring of the patent from the United States government should be for the joint benefit of Colbert and Burton and McKay, on the — day of August, 1899, and the — day of May, 1903, procured patents from the United States government to the hereinafter described portions of the ground included within the exterior boundaries of the Protection claim; the patents being procured under the name and designation of the 'Emery placer claim,' amended surveys 996 A and C. The portion of the said Emery placer mentioned as being included within the exterior boundaries of the Protection claim, and for which Colbert procured patent, is described as follows: 'Beginning at the northwest corner of the tract herein described, which is also corner No. 1 of survey No. 996 A, Emery placer,' etc. That Colbert in procuring patent acted as trustee for Burton and his grantees and successors. The Burtons then proceed to describe the portion of the Emery placer that William Burton claims to own by virtue of the deed from Colbert of parts of the Protection claim. Their answer concludes with the allegation that Colbert, since July 2, 1899, had no interest in the ground owned by William Burton and claimed no interest in his lifetime; that the Colbert estate "holds the legal title to said ground in trust for the use and benefit of the defendants." They pray that the administrator be declared a trustee, and be required by the court to execute a deed to William Burton for the land claimed by him, and that his title thereto be forever quieted as against the Colbert estate.

The defendant Alex. J. McKay claims to be the owner, by deed from Burton, of a certain portion of said ground, described in his answer. The defendant Frank Lawler claims to be the owner of what may be called the north fifty feet of the 60x200

feet strip, by conveyance from Burton. The defendants George and Annie Duwe claim the premises 50x60 feet in dimension, next south of the Lawler ground. The defendant Cora G. Stanley claims ownership of the south seventy-five feet of the same strip of ground. They all pray that the estate may be adjudged to hold the legal title of the respective pieces of ground in trust for them; also that their titles may be quieted as against the estate, and the administrator compelled to make conveyance to them of the land claimed by each.

By his reply the plaintiff admits what he terms the pretended location of the Protection claim, but alleges that it was not valid, because not made in good faith for the purpose of securing patent, and because the ground had previously been segregated from the public domain by means of the Emery placer location; denies that Colbert granted any portion of the ground to Burton, but admits that he quitclaimed that part described in the answers; admits the mesne conveyances through Burton to the other defendants; admits that defendants are in possession of a portion of the ground in controversy; but denies that Colbert placed them in possession.

The district court found all of the issues in favor of the defendants and entered a decree in their favor. The court found as a fact that the Protection claim contained within its exterior boundaries a certain described portion of the Emery placer, surveys A and C. The court concluded, as matter of law, that Colbert in his lifetime held the title to the premises claimed by defendants as trustee and that they are entitled to conveyances therefor from the plaintiff, as administrator. The court then adjudged the defendants to be the owners and entitled to the possession of the ground claimed by them, respectively. The decree concludes as follows: "It is further ordered, adjudged and decreed that the claims of plaintiff herein, as administrator of the estate of Charles Colbert, deceased, to said tracts of ground so adjudged to be the property of William Burton, Alex. J. McKay, Cora G. Stanley, Frank Lawler, John Duwe and Annie Duwe, are hereby adjudged and decreed to be

invalid and groundless, and the titles of the said William Burton, Alexander J. McKay, Cora G. Stanley, Frank Lawler, John Duwe and Annie Duwe, and their heirs and assigns thereto, are hereby adjudged to be quieted against all claims, demands, or pretensions of the said plaintiff, as administrator of the estate of Charles Colbert, deceased; and said plaintiff is hereby perpetually estopped and enjoined from setting up any claims thereto or to any part thereof."

The brief of appellants sets forth many assignments of error, but we are of opinion that when the case is stripped of some of the irrelevant matters considered by counsel, it is simple of consideration. We adopt the views of respondents' counsel as to the real questions at issue.

It is contended by appellant that the case necessarily involves a question of trusteeship on the part of Colbert, deceased. We do not think so. We eliminate that feature entirely. The question of estoppel is also argued by counsel. We do not deem it necessary to consider that question either. What have we left? Simply this: The plaintiff claims title to the ground in controversy by virtue of patents to the Emery placer, dated in 1899 and 1903, and asks to have the title of the estate quieted as to any claims of defendants. The defendants answer that prior to 1899, and subsequent to 1881, the date of location of the Emery placer, to-wit, on July 2, 1889, Colbert conveyed the ground in dispute to them and their predecessors in interest by a deed of grant, describing the same as a part of the Protection quartz lode mining claim. The questions to be solved are:

(1) What was the legal effect of the deed from Colbert to Burton?

(2) Can the property, attempted to be described therein, be identified so as to make the deed effective?

It is argued by counsel for plaintiff that the affirmative matter in the answer constitutes a "claim or demand against the estate of a deceased person," and that therefore none of the defendants were competent to testify as to any matter of fact occurring before Colbert's death. As we view the case, after-

discarding all questions of trusteeship on the part of Colbert, it is simply an attempt on the part of the plaintiff to break down those recitals of Colbert's deed to Burton, wherein he says that he has thereby "granted, bargained, sold, remised, released, conveyed, and quitclaimed" to Burton certain portions of the Protection quartz lode mining claim, by showing that the descriptions in said deed are so indefinite as to make the deed inoperative. We find nothing in the nature of claims or demands against Colbert's estate in these answers. The defendants are merely protecting themselves against the claims and demands of plaintiff.

It may be that during the course of the trial defendants' counsel took a position at times inconsistent with the one assumed by them in this court, but that fact alone does not characterize the nature of the action. The pleadings speak, and the party prevailing is entitled to such relief, in a cause of this nature, as his proof warrants. During the trial of causes in the district courts, both judge and counsel are often required to decide most important questions without adequate opportunity for investigation or research. As the testimony develops, different phases of the controversy present themselves, and it is matter of small wonder that occasionally views are entertained or expressed that are afterward changed or modified by later developments. We hold that these defendants are not seeking to enforce any claim or demand against the Colbert estate and that, therefore, they were competent witnesses. This conclusion disposes of all the other questions raised by appellant relative to this branch of the case.

The grant deed from Colbert to Burton, if it conveyed any ground at all, passed Colbert's after-acquired title therein. (Civ. Code, sec. 1512.) A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended. (Civ. Code, sec. 1511.)

We have no doubt of the correctness of the legal proposition that in deeding away a part of the Protection claim, as he did,

Colbert granted his interest in the ground, and his deed conveyed that portion of the Emery placer that was within the exterior boundaries of the Protection lode claim, if the disputed ground can be identified. It was immaterial by what name he designated the property in the deed. (*Phillpotts v. Blasdel*, 8 Nev. 61; *Weill v. Lucerne Mining Co.*, 11 Nev. 200; *Shreve v. Copper Bell Min. Co.*, 11 Mont. 309, 28 Pac. 315; *Wetzstein v. Largey*, 27 Mont. 212, 70 Pac. 717.) In the case of *House v. Jackson*, 24 Or. 89, 32 Pac. 1027, the supreme court of Oregon said: "The object and purpose of a description of real property is to mark out and designate the boundaries of a portion of the earth's surface, and, if this can be done as well by one name as another, that object has been fully accomplished."

And it makes no difference whether the Protection location was a valid one, as against others, or not. The name "Protection lode claim" simply identifies the property that Colbert intended to convey, and he is presumed to have intended, by his grant deed, to pass the best title he had in the ground, by virtue of section 1511 of the Civil Code.

Plaintiff contends that the property conveyed by Colbert to Burton cannot be identified as any part of the Emery placer claim. The main portion of his argument, however, is devoted to the position that Burton could not be a witness himself, and that, therefore, his statement to the witness Barker, who surveyed the disputed ground, as to where the initial corner of the Protection was originally located, was incompetent testimony, without which the attempted survey was of no value as evidence. Our decision that the defendants were competent witnesses practically disposes of this contention. Burton testified that he and Colbert located the Protection claim, and that he knew where the corners were. He says: "I showed Mr. Barker the location corners, and showed him the northwest corner. Colbert showed me the corners and where to put them up, and he ought to know. The northwest corner of the Protection was right at the rear of Alex. McKay's house. That post was there when I sold, and that post is there yet. The fence was obliterated, but the post

was there. It is in the rear of the house, right on a line with the northeast corner. It is right where it should be. I showed Mr. Barker the stakes last year, I think." Barker testified: "Mr. Burton told me that the northwest corner of the Protection is the same as the northwest corner of the Emery placer." Also: "I took as a starting point to make the survey the northwest corner of the Emery placer, and I assumed that that was the northwest corner of the Protection, and the surveys were based upon that statement of facts. I don't see what right I would have to tell one of the original locators of the claim that he was telling an untruth." He then testified, from a map prepared by him, as to the location and dimensions of the several pieces of ground in dispute, within the exterior boundaries of the Emery placer and also of the Protection lode claim. Lawler testified: "He [Colbert] asked me if I had a deed from McKay. I said, 'Yes'; and he said it was as good as any deed that could be given in the United States. He said I had a perfect right."

Defendant Alex. J. McKay testified: "When I bought that interest in the Protection lode claim from Burton, the deed was given in the presence of Charles Colbert at Mr. Burton's house, where I paid the money, laid the money on the table, and Charles Colbert, for \$100 I gave Burton, receipted for \$50 that he paid him at that time. It was agreed that I should pay that money, and pay for the assessment work for two years. Mr. Colbert said it was all right, and he seemed very anxious for Burton to sell me that ground under those conditions. I took possession of the ground. Mr. Colbert and Mr. Burton showed me the stakes, measured off that particular part where I concluded at the time to build a house, and I was going to put up a stable there, me and another man that was in the commission business. Mr. Colbert showed me the stakes, and measured off the lot that they sold me—measured it over again. Mr. Colbert and Mr. Burton measured it off, and put up stakes at the corner. They both did that. I know what particular lot this was that they sold me. It was in the northwest corner of the Protection lode. It is the same lot that Mr. Lawler has at this

time, in the northwest corner of the Emery placer. I know where the northwest corner of the Protection lode claim is, and know where they are with reference to each other on the ground." These declarations of Colbert were admissible against his personal representative. (*Stanley v. Green*, 12 Cal. 148.) In this latter case Mr. Justice Field said: "The law will not declare the instrument void for uncertainty until it has been examined with all the light which contemporaneous facts may furnish."

We think the testimony sufficient to identify the ground as a part of the Emery placer and to justify the court's findings on that branch of the case.

Where monuments or marks called for in a deed or grant are lost or otherwise uncertain, their location may be proved by parol evidence. (5 Cyc. 961; *Cobb v. Cole*, 44 Minn. 278, 46 N. W. 364; *Barrett v. Murphy*, 140 Mass. 133, 2 N. E. 833; *Caspar v. Jamison*, 120 Ind. 58, 21 N. E. 743; *McAlpine v. Reicheneker*, 27 Kan. 257; *Smiley v. Fries*, 104 Ill. 416.)

We are of opinion, after a careful examination of the testimony, that it was sufficient to sustain the other findings of the court below.

The solution of the foregoing questions incidentally disposes of all other points raised by the appellant.

The decree heretofore entered by the district court of Silver Bow county, and the order denying appellant a new trial, are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

Rehearing denied December 11, 1907.

EVERS, APPELLANT, v. HUDSON, COUNTY TREASURER, RESPONDENT.

36	135
138	322
36	135
40	279

(No. 2,484.)

(Submitted November 11, 1907. Decided November 18, 1907.)

[92 Pac. 462.]

County Free High Schools—Special Elections—Statutes—Construction—Title—Raising Revenue—Governor's Approval—Election Proclamation—Notice—Statutory Requirements—Taxes—Invalidity.

Statutes—Title—Meaningless Words—Elimination—Constitution.

1. Meaningless words or phrases in the title of an Act may be discarded by construction, and if, after such elimination, the title clearly expresses the subject embraced in the Act, it is not objectionable to the provision of Section 23, Article V, of the Constitution, that the subject of every bill shall be clearly set forth in its title.

Same—County Free High Schools—Title.

2. *Held*, that the title to Chapter 29, Laws of 1907, page 50, relating to the establishment and maintenance of county free high schools, is not so defective as to violate the provisions of section 23, Article V, of the Constitution. Omitting the meaningless portion found in the latter portion of the title, it is clear and comprehensive, and could not have been misunderstood by the legislature or the people.

Same—Title—More Than One Subject—Constitution.

3. In determining the question whether an Act offends against the constitutional inhibition that no bill shall be passed containing more than one subject (Const., Art. V, Sec. 23), the object sought to be accomplished by the legislation is a proper subject of inquiry.

Same.

4. If all parts of a statute have a natural connection and can reasonably be said to relate, directly or indirectly, to one general and legitimate subject of legislation, the Act is not open to the charge that it violates the constitutional provision of section 23, Article V, of the Constitution, that no bill shall be passed containing more than one subject.

Same—County Free High Schools—Title—More Than One Subject—Constitution.

5. *Held*, under the rule set forth in the foregoing paragraph, that the Act of 1907, page 50 (Chapter 29), does not contain more than one subject, to-wit, provision for the establishment and maintenance of county free high schools, and for validating all acts done under enactments of the legislature passed on the subject at prior sessions.

Same—Bills for Raising Revenue—Free County High Schools—Constitution.

6. The constitutional provision that all bills for raising revenue shall originate in the house of representatives (Const., Art. V, sec.

32) is confined in its meaning to bills to levy taxes, strictly speaking, and does not extend to bills for other purposes, but which may incidentally create revenue; hence, the Act of 1907, page 50 (Chapter 29), which originated in the senate, and which, in sections 8 and 9, makes provision for a tax to supply funds for the current expenses of the county free high schools, and for bond issues which may be necessary to raise money to build or purchase school property, does not run counter to the Constitution in this respect.

Same—County Free High Schools—Delegation of Legislative Power.

7. *Held*, that the Act of 1907, Chapter 29, page 50, authorizing the establishment of county free high schools, being a local option law, of uniform operation, the taking effect of which in any particular county is made dependent upon a favorable vote of the electors of such county, is not an unwarranted delegation of legislative power to such electors.

Constitution—Power of Legislature.

8. The state Constitution being a limitation upon, and not a grant of, legislative power, such power is supreme, in the absence of a specific prohibition in that instrument or the use of words which imply a prohibition.

Same—County Free High Schools—Power of Legislature.

9. Section 1, Article XI, of the Constitution commands the legislature to make provision for a general, uniform and thorough system of public free common schools. Section 11 of the same Article provides for the supervision and control of the state educational institutions. *Held*, that these provisions are not exclusive so as to limit the legislative power to the establishment and maintenance of common schools and state institutions only, but that other schools, such as county free high schools, may be established under these sections.

Same—County Free High Schools—Location—Legislative Power.

10. The fact that by section 3 of the Act establishing county free high schools (Laws 1907, Chapter 29, p. 50) the electors who favor the establishment of such schools are designated as the persons who shall determine the location of it, is not a valid objection to its constitutionality as depriving those opposed to such school of the right to vote on the question of its location, contrary to section 2, Article IX, of the Constitution, providing that every male person possessing the necessary qualifications shall have the right to vote upon all questions which may be submitted to the vote of the people.

County Free High Schools—Act Establishing—Failure of Governor to Approve—Effect.

11. The Act above provides that it "shall take effect and be in full force from and after its passage and approval by the governor." It was never expressly approved by the governor, but became a law pursuant to section 12, Article VII, of the Constitution. *Held*, that the provision of this section, that if any bill be not returned by the governor within five days after presentment to him, it shall be a law, in like manner as if he had signed it, is binding upon the legislature, and that the Act became a law notwithstanding the provision in the Act above referred to.

Statutes—Construction—Legislative Policy.

12. In the construction of statutes, courts are not at liberty to question the legislative wisdom or policy.

County Free High Schools—Elections—Proclamation—Notice.

13. Section 3 of the Act of 1907, making provision for the establishment of county free high schools (Laws 1907, Chapter 29, p. 50),

declares that the special election therein mentioned "shall be conducted in accordance with the general election laws of the state." It provides for a notice of election, but makes no mention of an election proclamation. *Held*, that the general election laws are applicable to such special election, except in so far as superseded by the special provisions of the Act, and that the notice of election does not take the place of the election proclamation, made necessary by the reference to the general election laws.

Elections—Statutory Requirements—Duty of Officers.

14. Officers charged by statute with giving a certain notice relative to a special election must at least substantially comply with such requirement,—even assuming it be directory only,—and cannot wholly disregard it or substitute something entirely different in lieu thereof.

County Free High Schools—Elections—Proclamation—Notice—Taxes—Invalidity.

15. Where the defendant county treasurer, in an action to enjoin the collection of a tax imposed for the purpose of establishing a county free high school pursuant to Act of 1907 (Laws 1907, Chapter 29, p. 50), interposed a demurrer, and thus admitted an allegation in the complaint that because of the failure of the board of county commissioners to proclaim the holding of a special election provided for in the Act, and of the clerk to give proper notice, a large number of qualified electors were prevented from voting, the voters had not been given that opportunity to freely and fairly give expression to their wishes, as contemplated by the election laws, and therefore the election was void, and the tax, levied in pursuance thereof, void.

Appeal from District Court, Chouteau County; Jno. W. Tattan, Judge.

ACTION by C. H. Evers against L. O. Hudson, county treasurer of Chouteau county. From a judgment of dismissal, entered on sustaining a general demurrer to the complaint, plaintiff appeals. Reversed and remanded.

Mr. F. E. Stranahan, and Messrs. Walsh & Newman, for Appellant.

In the case of special elections, where the statute requires notice to be given, the special election will be declared void, in the absence of such notice. (*People v. Laenna*, 67 Ill. 67; *People v. Santa Anna*, 67 Ill. 57; *Bowen v. Town of Greensboro*, 79 Ga. 709, 4 S. E. 159; *Hemerick v. City of Athens*, 89 Ga. 674, 16 S. E. 72; *Crooke v. Daviess Co. Commrs.*, 36 Ind. 320; *Detroit E. R. & I. Co. v. Bearss*, 39 Ind. 598; *Commonwealth v. Barrett*, 13 Ky. Law Rep. 451, 17 S. W. 336; *People v.*

Caruthers School Dist., 102 Cal. 184, 36 Pac. 396; *George v. Oxford Tp.*, 16 Kan. 72; *Jones v. State*, 1 Kan. 273; *Jacksonville N. & S. R. Co. v. Virden*, 104 Ill. 339; *Barry v. Lauck*, 45 Tenn. 588; *Foster v. Scarff*, 15 Ohio St. 532; *Secord v. Foutch*, 44 Mich. 89, 6 N. W. 110; *Cook v. Mock*, 40 Kan. 472, 20 Pac. 259; *People v. Thompson*, 67 Cal. 627, 9 Pac. 833; *People v. Rosborough*, 14 Cal. 181; *People v. Weller*, 11 Cal. 49, 70 Am. Dec. 754; *People v. Porter*, 6 Cal. 27.)

Whether or not the publication of the election notice was duly made is a question of law for the court. (15 Cyc. 324, citing *Williams v. Roberts*, 88 Ill. 11; *Maze v. Slemmons*, 14 Ky. Law Rep. 660.)

The Act in question here is unconstitutional, because it prescribes qualifications for voting not prescribed in the constitution, and denies the voter equal rights and equal protection of the laws. (*Attorney General v. Detroit Common Council*, 58 Mich. 213, 5 Am. Rep. 675, 24 N. W. 887; *Coffin v. Board of Election Commrs.*, 97 Mich. 188, 56 N. W. 557; *State v. Blake*, 57 N. J. L. 6, 29 Atl. 417; *State v. Tuttle*, 53 Wis. 45, 9 N. W. 791; *State v. Findlay*, 20 Nev. 198, 19 Am. St. Rep. 346, 19 Pac. 241; *State v. Fitzgerald*, 37 Minn. 26, 32 N. W. 788; *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659; *State v. Dillon*, 32 Fla. 545, 14 South. 383; *Morris v. Powell*, 125 Ind. 281, 25 N. E. 221; *Gougar v. Timberlake*, 148 Ind. 38, 62 Am. St. Rep. 487, 46 N. E. 339.)

It is an elementary rule that the power to legislate cannot be delegated. It has been held that the legislature may not delegate to localities the power to decide whether they shall assume control of their school, or what amount they should expend in school supplies. (*Werner v. Galveston*, 72 Tex. 22, 7 S. W. 726, 12 S. W. 159; *Greencastle Tp. v. Black*, 5 Ind. 557.) In passing the High School Act the legislative assembly either legislated upon the subject itself and established high schools, leaving their acceptance to be voted upon, or it delegated to the counties the right to legislate thereon and establish high schools for themselves. If it did the former, their act was unconstitutional, because the constitution provides: "Educational • • •

institutions * * * shall be established and supported by the state in such a manner as may be prescribed by law." (Const., Art. X, sec. 1.) If it did the latter, their act is unconstitutional, because of their attempted delegation of power to legislate.

In the passage of an Act to take effect upon a contingency, "the statute must be a complete and absolute expression of the legislative will—a law *in praesenti*, to take effect *in futuro*." (26 Am. & Eng. Ency. of Law, 2d ed., p. 567.) If the High School Act was a law *in praesenti*, it was the establishment of educational institutions in counties, to be supported by counties only, while the constitution (Art. X, sec. 1, *supra*) provides that all such institutions so established shall be supported by the state.

The subject of the Act is not clearly expressed in its title. (*State v. Brown*, 29 Mont. 179, 74 Pac. 366. See *State v. Mitchell*, 17 Mont. 67, 52 Pac. 100; *Yagen v. Commissioners*, 34 Mont. 79, 85 Pac. 740.)

The Act is unconstitutional, because it contains more than one subject. The bill relates to establishing and maintaining county free high schools. That is the primary and principal object and subject of the Act. Anything contained in the Act not germane to the subject vitiates the Act. (*Spaulding v. Independent Co.*, 42 Or. 394, 71 Pac. 132; *Trumbull v. Trumbull*, 37 Neb. 340, 55 N. W. 869; *Railroad Co. v. Saunders Co.*, 9 Neb. 407, 4 N. W. 240.)

Mr. Albert J. Galen, Attorney General, *Mr. W. H. Poorman*, and *Mr. E. M. Hall*, Assistant Attorneys General, for Respondent.

The notice of the special election here involved, while not a literal, was a substantial, compliance with the law, and therefore sufficient. (*Seymour v. Tacoma*, 6 Wash. 427, 33 Pac. 1059; *Welsh v. Wetzel County Court*, 29 W. Va. 631, 1 S. E. 337; *McCrary on Elections*, sec. 178.)

A liberal construction is given to the Constitutional provision requiring an Act to embrace but one subject. (*Jobb v. County of Meagher*, 20 Mont. 424, 51 Pac. 1034; *Bobel v. People*, 173

Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322.) All doubts are resolved in favor of the constitutionality of the law. (*Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821; *Jobb v. Meagher County*, 20 Mont. 434, 51 Pac. 1034; *State v. McKinney*, 29 Mont. 375, 74 Pac. 1095,) A plural title will not invalidate a law unless the law is itself plural. (*Northern Counties Investment Trust v. Sears*, 30 Or. 388, 41 Pac. 931; *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795, 24 S. E. 930, 31 L. R. A. 822, 26 Am. & Eng. Ency. of Law, 575, note 4.) "The legislature has a right to choose the title of an Act passed by it, and such title may be as broad and comprehensive as the legislature may choose to make it, or it may be as narrow and restricted as that body may choose to make it. It may be broad enough to include innumerable minor subjects if they can be so combined and united as to permit of only one grand and comprehensive subject; or it may be so narrow and restricted as to include only the smallest and minutest subject." (*Bobel v. People*, 173 Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322; *In re White*, 33 Neb. 812, 51 N. W. 287; *State v. Barrett*, 27 Kan. 213.) If the subjects embraced in the statute or the title thereof have congruity, or are connected with the subject, or are cognate or germane, the statute or title is not plural. (*Jobb v. Meagher County*, 20 Mont. 424, 51 Pac. 1034; *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795, 24 S. E. 930, 31 L. R. A. 822; *Ewing v. Hoblitzelle*, 85 Mo. 64.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

A petition, signed by the requisite number of freeholders of Chouteau county, was presented to the board of county commissioners of that county, requesting that an election be called to determine the question of the establishment of a free county high school in that county. The required notice was given by the county clerk of the filing of such petition, and thereafter the city of Havre was duly nominated as a candidate for the location of such school. The board of county commissioners ordered a special election to be held, and directed the county

clerk to give the notice of election. The clerk caused to be published a notice of such special election, which failed to make any mention of the name of Havre, or of any other city or town, as a candidate for the location of such school, and failed to mention the fact that the matter of the location of such school would be voted upon. At the election on July 6, 1907, 1,125 votes were cast; 545 were cast against the establishment of a high school; 577 in favor of that proposition, and in favor of Havre as the location of such school; 1 vote was cast in favor of Benton; and 2 in favor of Zortman. The board of commissioners met, canvassed the returns, declared that the proposition for the establishment of the school had carried and that Havre had been chosen as the location of such school. A board of high school trustees was thereupon appointed, which board met, made an estimate of the funds necessary for the maintenance of such school for the ensuing school year, which estimate was duly certified to the county clerk, and the board of county commissioners made a levy of one mill on the dollar of the assessed valuation of taxable property within Chouteau county for the purpose of raising such necessary funds. This tax was extended on the tax-rolls, and in due course of time such tax-rolls were delivered to the respondent, the county treasurer, for the purpose of collecting the taxes. Thereupon this action was commenced by the plaintiff, a taxpayer of Chouteau county, to enjoin the county treasurer from collecting this one-mill levy for high school purposes. The complaint sets forth fully all the acts and things done in connection with the special election.

To this complaint the defendant interposed a general demurrer, which was sustained, and, the plaintiff electing to stand upon his complaint, a judgment was rendered and entered dismissing the action, from which judgment this appeal is prosecuted.

In appellant's brief two contentions are made, and these raise numerous questions for determination: First, it is contended that the statute under which it was attempted to proceed is uncon-

stitutional; second, it is said that, if the statute is constitutional, its provisions were not followed, and the tax levied is void.

1. The statute under consideration is Chapter 29 of the Acts of the Tenth Legislative Assembly (Sess. Laws, 1907, p. 50).

(a) It is contended that the title of the Act is fatally defective. The title, as given in the enrolled bill, is as follows: "An Act to establish County Free High Schools and provide for their maintenance, 'approved March 3, 1899, and repealing 'An Act to amend sections, 2, 3, 4, 6, 8, 11, 12, 13, 14, 16, 17, and 19, and to repeal Sections 21 and 22 of Substitute for House Bill No. 69: 'An Act to establish County Free High Schools and to provide for their Maintenance, approved March 3, 1899, and to renumber certain sections of said Act,' approved March 14, 1901; also repealing Chapter LXIX of the Laws of 1903, entitled: 'An Act to amend sections 2 and 3 of Senate Bill No. 37, as enacted by the Seventh Legislative Assembly of the State of Montana, relating to the election of trustees of the County Free High Schools,' approved March 5, 1903, and to validate everything done under any of said Acts of March 3, 1899, March 14, 1901, and March 5, 1903."

Section 23, Article V, of the Constitution, provides that the subject of every bill, except certain designated ones, shall be clearly expressed in its title. In *State v. McKinney*, 29 Mont. 375, 74 Pac. 1095, this court, in considering this particular provision of the Constitution, laid down five rules for determining whether any particular Act is invalid by reason of a defective title. A reference to that case is sufficient, and those rules need not be reproduced here. In addition we may add: (6) This provision of the Constitution relates to matters of substance, and not merely to matters of form. (7) "If a title fairly indicates the general subject of the Act, is comprehensive enough in its scope reasonably to cover all the provisions thereof, and is not calculated to mislead either the legislature or the public, this is a sufficient compliance with the constitutional requirement." (26 Am. & Eng. Ency. of Law, 2d ed., 579.) (8) "Generality or comprehensiveness in the title is no objection,

provided the title is not misleading or deceptive and fairly directs the mind to the subject of the law in a way calculated to attract the attention truly to the matter which is proposed to be legislated upon." (26 Am. & Eng. Ency. of Law, 2d ed., 581.) And (9) "meaningless words and phrases may be discarded by construction, and if, after such elimination, the title clearly expresses the subject of the Act, it is sufficient." (26 Am. & Eng. Ency. of Law, 2d ed., 584.)

These principles in general terms had already been announced in this state. (*State v. Mitchell*, 17 Mont. 67, 42 Pac. 100.) In *State v. Anaconda C. M. Co.*, 23 Mont. 498, 59 Pac. 854, this court, in considering this same constitutional provision, said: "But by this constitutional notice it is only intended that the subject of the bill shall be fairly expressed in the title. It is not necessary—for the Constitution has not so declared—that a title shall embody the exact limitations or qualifications contained in the bill itself which are germane to the purpose of the legislature, if the general subject of the measure is clearly expressed in the title. Upon the highest authority it is held that, under constitutional provisions substantially like that referred to in Montana, where the degree of particularity necessary to be expressed in the title of a bill is not indicated by the Constitution itself, the courts ought not to 'embarrass legislation by technical interpretations based upon mere form of phraseology. The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or, if but one object, that it was not sufficiently expressed by the title.' " This was approved in *Yegen v. Board of Commissioners*, 34 Mont. 79, 85 Pac. 740.

The supreme court of Indiana has announced the same doctrine in the following language: "The title will sufficiently conform to the command of the Constitution if it be so framed and worded as to fairly apprise the legislators and the public in general of the subject matter of the legislation, so as to rea-

sonably lead to an inquiry into the body of the bill. The constitutional requirement may be interpreted to mean that the Act and its title must correspond, not literally, but substantially, and such correspondence is to be determined in view of the subject matter to which the legislation relates." (*Mauls Coal Co. v. Partenheimer*, 155 Ind. 100, 55 N. E. 751.)

In considering a like constitutional provision the supreme court of Minnesota, in *State ex rel. Olsen v. Board of Control*, 85 Minn. 165, 88 N. W. 533, said: "Throughout all the decisions it will be found that it is a regard for the law itself, rather than any puerile consideration for the title, which is made the essential object of judicial anxiety. A review of the cases where this court has set aside statutes because in violation of section 27, Article 4, will show that the Act was in every respect (to adopt the language of Justice Flandrau in *Board of Supervisors of Ramsey County v. Heenan*, 2 Minn. (Gil. 281, 330), entirely foreign to the object 'expressed in the title,' thus furnishing the evidence of such a fraud in securing its enactment that the law 'would never have received the sanction of the legislature, had the members known the contents of the Act.' " (See, also, *Commonwealth v. Brown*, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110; *Allen v. Hopkins*, 62 Kan. 175, 61 Pac. 750; Sutherland on Statutory Construction, sec. 86.)

Tested by these rules, we think the title of this Act is not subject to the objection urged. Stripped of the meaningless portion, it reads: "An Act to establish County Free High Schools and provide for their Maintenance, and to validate everything done under any of said Acts of March 3, 1899, March 14, 1901, and March 5, 1903." This title is clear and comprehensive. It indicates the object to be accomplished, and it would appear impossible that anyone could have been misled by reason of the insertion of the meaningless portion, just eliminated. The enactment of this statute would have the effect of repealing existing statutes in conflict with it, whether such intended repeal was indicated by the title or not.

(b) The same section of the Constitution referred to above, with the exceptions noted, provides that no bill shall be passed containing more than one subject; and it is contended that the Act under consideration offends against this provision, in that it attempts to provide for the establishment and maintenance of county free high schools, and for validating everything done under certain prior Acts of the legislature. In determining the question thus raised, the object sought to be accomplished by the legislature is always a proper subject of inquiry. It is a part of the history of this state that the first measure, having in view the establishment of a uniform system of county free high schools, was passed and approved March 3, 1899 (Sess. Laws, 1899, p. 59). Certain amendments were made by the legislature in 1901 (Sess. Laws, 1901, p. 6), and again in 1903 (Sess. Laws, 1903, p. 139); and the legislature will be presumed to have taken cognizance of the fact that steps had been taken in several counties of the state to carry these several Acts into effect.

It is perfectly apparent that the object of the legislature in 1907 was to perfect the legislation upon the subject, and for that purpose an entirely new and more comprehensive Act was proposed. It was likewise the purpose to entirely supplant all previous legislation upon the subject, but at the same time to validate the acts of the several counties under prior laws. In other words, its purpose was to provide for the organization and maintenance of a uniform system of county free high schools.

The object of the constitutional provision now under consideration is not to embarrass honest legislation, but to prevent the vicious practice, which prevailed in states which did not have such inhibitions, of joining in one Act incongruous and unrelated matters. The rule of interpretation now quite generally adopted is that, if all parts of the statutes have a natural connection and can reasonably be said to relate, directly or indirectly, to one general and legitimate subject of legislation, the Act is not open to the charge that it violates this constitutional

provision; and this is true no matter how extensively or minutely it deals with the details looking to the accomplishment of the main legislative purpose. (26 Am. & Eng. Ency. of Law, 2d ed., 575.) Or, stating the converse of the proposition, it may be said that if, after giving the Act the benefit of all reasonable doubts, it is apparent that two or more independent and incongruous subjects are embraced in its provisions, the Act will be held to transgress the constitutional provision, and to be void by reason thereof. (26 Am. & Eng. Ency. of Law, 2d ed., 578; *Jobb v. Meagher County*, 20 Mont. 424, 51 Pac. 1034; *Northern Counties Investment Trust v. Sears*, 30 Or. 388, 41 Pac. 931, 35 L. R. A. 188; *Allen v. Hopkins*, above; *Maule Coal Co. v. Partenheimer*, above; Cooley's Constitutional Limitations, 7th ed., p. 205.)

Viewed in the light of these rules, we think the Act now under consideration treats of one general subject only, the establishment and maintenance of a system of county free high schools, and is not open to the objection urged in this portion of appellant's brief.

(c) It is further urged against the validity of this Act that its purpose is to raise revenue and, since the bill for the Act originated in the state senate, the Act is invalid as in contravention of section 32, Article V, of the Constitution, which provides: "All bills for raising revenue shall originate in the house of representatives; but the senate may propose amendments, as in the case of other bills."

The bill for this Act originated in the senate, and was designated "Senate Bill No. 28." Was it a "bill for raising revenue," within the meaning of that phrase as used in section 32 of Article V, above? The federal Constitution, and, so far as we know, the Constitution of every state contains a like provision, and the subject under discussion has received generous attention from courts of last resort.

In *State v. Bernheim*, 19 Mont. 512, 49 Pac. 441, this court held that the provision of the Constitution now under consideration must be confined in its meaning to bills to levy taxes

in the strict sense of the words, and has not been understood to extend to bills for other purposes which may incidentally create revenue. And this is the interpretation now generally adopted. (*Curryer v. Merrill*, 25 Minn. 1, 33 Am. Rep. 450; *Commonwealth v. Bailey*, 81 Ky. 395; *Northern Counties Investment Trust v. Sears*, above; *The Nashville*, 4 Biss. 188, Fed. Cas. No. 10,023; *United States v. Norton*, 91 U. S. 566, 23 L. Ed. 454; *Twin City Bank v. Nebeker*, 167 U. S. 196, 17 Sup. Ct. 766, 42 L. Ed. 134; 1 Story on the Constitution, sec. 880.)

The only provisions of this Act relating to taxation or revenue provide for a tax to supply funds for the current expenses of such schools (Section 8), and for bond issues to raise money to build or purchase school property (Section 9). In any event, the tax is only upon the property of the county, and the funds to be raised belong exclusively to the particular school for which they are raised. No part of the funds can by any possible means find its way into the state treasury, and the provisions of this section of the Constitution clearly refer to revenues of the state. This seems to have been the view entertained by this court in *State v. Bernheim*, for, after announcing the doctrine above, it is said: "Tested by these rules, we are clearly of the belief that there is nothing in the context of the bill to justify the opinion that the motive of the legislature in passing it was to raise revenue for the state."

In *Rankin v. City of Henderson*, 9 Ky. Law Rep. 861, 7 S. W. 174, the court said: "Nor is the Act unconstitutional because the bill, conferring the power, had its origin in the senate. The object of the bill, it is true, was to raise revenue for the local government; but the provision of the Constitution requiring 'bills for raising revenues' to originate in the house cannot be applied to a license tax, or to any tax imposed merely for the maintenance of a municipal corporation. The provision of the Constitution in question applies to the state, or the revenue that goes into or properly belongs to the state treasury." To the same effect is *Fletcher v. Oliver*, 25 Ark. 289; *Opinion of Justices*, 126 Mass. 601.

This Act does not assume to levy a tax, but at most only authorizes the county commissioners to make a levy. In *Harper v. Commissioners*, 23 Ga. 566, it is said: "Besides, the delegation of the power to tax and the laying of a tax are two things. This Act does the first; the last, it does not do. The constitutional provision applies to an Act which does the last, and does not apply to an Act which does the first."

For these reasons we hold that the provisions of section 32, above, have no application, and it is entirely immaterial whether the bill for the Act originated in the senate or house of representatives.

(d) Again it is urged that the Act is void because it delegates to the voters of the county power to legislate, or to establish high schools at the county's expense, contrary to the provisions of the Constitution.

The Act is a local option law, of uniform operation; but its taking effect in any particular county is made dependent upon a favorable vote of the electors of that county. That an Act of this character is not open to the objection that it is an unwarranted delegation of legislative power has been determined by this court. In *In re O'Brien*, 29 Mont. 530, 75 Pac. 196, it is said: "The most frequent objection made is that such laws are an unwarranted delegation of legislative power to the people. Under our system of government the law-making authority is vested in the legislative assembly, and can be exercised by no one else. The legal effect of the popular vote, however, is not infrequently misconceived. If the law is complete in all its parts, it is an expression of the legislative will none the less that the contingency upon which it takes effect in any particular locality is made to depend upon a favorable vote of the people of that locality. * * * While the legislature may not delegate to the people the authority to make the law, or to say what kind of a restrictive measure shall be adopted, or propose a law and submit it to a vote of the people to say whether or not it shall in fact be enacted into law, it may pass as an Act which takes effect only upon the happening of a contin-

gency—a favorable vote of the people.” (See, also, *People ex rel. Boardman v. City of Butte*, 4 Mont. 174, 47 Am. Rep. 346, 1 Pac. 414; 15 Cyc. 319.)

But it is further said that the legislature was without the power or authority to provide for the establishment of high schools to be supported by the several counties. Section 1, Article XI, of the Constitution, commands the legislature to make provision for a general, uniform and thorough system of public free common schools; and by section 11 of the same Article provision is made for the supervision and control of the university and other state educational institutions. It is now said that these provisions are exclusive, and limit the legislative authority to establishing and maintaining common schools and state institutions. But, when we consider that our Constitution is a limitation upon, and not a grant of, legislative power, in the absence of some specific prohibition in the Constitution, or the use in that instrument of terms which imply a prohibition, the legislative power must be held to be supreme.

In *State ex rel. Sam Toi v. French*, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415, this court said: “Constitutions of a state are distinguished from the Constitution of the United States in this: ‘The government of the United States is one of enumerated powers; the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess. In this respect it differs from the Constitutions of the different states, which are not grants of powers to the states, but which apportion and impose restrictions upon the powers which the states inherently possess.’ (Cooley’s Constitutional Limitations, 10.) Therefore, a state legislature is not acting under enumerated or granted powers, but rather under inherent powers, restricted only by the provisions of their sovereign Constitution.” (See, also, *State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, 44 Pac. 516, 32 L. R. A. 635.)

In 8 Cyc. 776, the general rule of construction is announced as follows: “And by the weight of authority statutes passed

by the state legislatures, and free from objections on constitutional grounds, must be enforced; for the power of a state to enact laws within its constitutional limits is supreme. The only test of the validity of an Act regularly passed by a state legislature is whether or not it violates the state or federal Constitutions in express terms or by clear implication. Courts are never at liberty to question the wisdom or policy of an Act of the legislature; their duty being to enforce such Acts as are passed to the extent to which they are found to be constitutional, and no further."

The evident purpose of section 1, Article XI, above, was to insure a system of common schools; but there is not anything in that section, or elsewhere in the Constitution, which directly limits, or by implication may be said to limit, the power of the legislature to provide for other schools. As to whether there is any limitation, beyond which the law-making power may not go in matters of this character, need not now be considered. It was said in *Koester v. Board of County Commissioners*, 44 Kan. 141, 24 Pac. 65: "The concern of the Constitution makers does not seem to have been to provide against the danger of too many schools, but to secure a common school system principally, and also other schools of a higher grade."

Section 1, Article XI, is not a limitation upon the legislative power, but is a solemn mandate to the legislature. That the chief concern of the framers of the Constitution was directed to free common schools is evidenced by the facts that such schools are made sole beneficiaries of the public school funds. But the declared concern of the Constitution framers for a system of public free common schools does not in any sense militate against the power of the legislature to establish other schools. "The matter of education is one of public interest, which concerns all the people of the state, and is therefore subject to the control of the legislature." (*State ex rel. McCausland v. Board of Commissioners*, 61 Kan. 90, 58 Pac. 959, 47 L. R. A. 67; see, also, *People ex rel. Pixley v. Lodi High School District*, 124 Cal. 694, 57 Pac. 660.)

(e) It is said again that the Act is invalid, for the reason that it denies to the voters who were opposed to the establishment of a high school the right to vote upon the question of the location of such school, and section 2, Article IX, of the Constitution, is cited in support of this contention. That section provides that every male person, of the age of twenty-one years or over, possessing certain qualifications, shall have the right to vote "upon all questions which may be submitted to the vote of the people."

The Act of 1907 prescribes the form of the ballot and the method of voting as follows:

"The ballot shall be substantially in the following form:

"For a County High School at

"Helena,

"Marysville,

"Against a County High School.

"An elector desiring to vote for the establishment of a high school shall do so by placing an X before the name of the town at which he desires the high school to be located, which shall also be a vote in favor of such town. An elector desiring to vote against the establishment of a high school shall do so by placing an X before the clause 'Against a County High School,' and shall not vote for any town." (Section 3.)

It is apparent that in the contemplation of the legislature only one question was to be submitted; for the Act in section 3 provides that the clerk shall give notice "*that the question* of the establishment of a county free high school in said county and the location thereof will be submitted to the qualified electors," etc. The legislature apparently entertained the idea that the location of the school was a mere incident.

But it is contended upon the part of the appellant, that every elector ought to have the right to vote for or against the proposition to establish the school, and, in addition, ought to have the right to vote for the location of the school at one particular place, as against any other place; and it is said that any other

construction of the Act might lead to complications in the event of a tie vote for the location of the school. But this possible contingency need not weigh with us in determining the validity of this Act; for, if the question of the location of the school is one which can only be determined by submitting it to a vote of the qualified electors of the county, then this Act is invalid.

But, as we have said above in paragraph "d," the establishment and maintenance of a system of county free high schools is a proper exercise of the legislative power, and the method to be pursued in establishing such schools, or in securing locations for them, is one of legislative discretion. In other words, the legislature might have provided for the establishment of such a school in every county in the state, without submitting the question to the electors at all, and might, with equal authority, have made provision for submitting the question of the particular location to the board of county commissioners, or the board of trustees of such school, or to any other select body of citizens; for the mere act of selecting a site is not a legislative act at all.

In *People v. Dunn*, 80 Cal. 211, 13 Am. St. Rep. 118, 22 Pac. 140, the court was considering an Act of the legislature making an appropriation for the purchase of a site and the erection of suitable buildings for the California Home for the Care and Training of Feeble-Minded Children, which Act provided that the site should be selected by a committee consisting of the board of trustees of the home and two other citizens, to be appointed by the governor. An objection was urged against the validity of the Act that "it delegates legislative powers and functions to a board of trustees aided by two citizens; the two bodies forming a commission clothed with legislative powers and functions." But the court dismissed the contention by saying: "Nor do we think there is any force in the objection that, by providing that certain persons should select the site for the building proposed to be constructed, the Act attempted to delegate legislative functions and powers. To hold that such a power could not be vested

in persons named in the Act would be an unreasonably strict application of the rule that legislative functions cannot be delegated. The mere act of selecting a site to be purchased was not a legislative act."

We think this is correct and conclusive upon this branch of the case; for, if the legislature could designate the board of county commissioners to select the site, no objection can be urged against the designation of those voters who favor the establishment of the school as the particular persons who shall determine the location of the school.

(f) Section 23 of this Act provides: "This Act shall take effect and be in full force from and after its passage and approval by the governor." The Act was never expressly approved by the governor, but became a law pursuant to the provisions of section 12, Article VII of the Constitution, which section, so far as applicable, reads as follows: "If any bill shall not be returned by the governor within five days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it." This provision of the Constitution is binding upon the legislature, and this Act became a law in like manner as if it had been signed by the governor, any provision in the bill notwithstanding.

We think the Act is not open to any of the objections urged against it.

2. But it is contended that, even if the Act is valid, its provisions were not followed, and the election was therefore invalid, and the tax levy, made in consequence of the election, void.

Section 3 of the Act provides that the election at which the question of the establishment of a high school is to be determined "shall be conducted in accordance with the general election laws of the state." And again, in the same section it is provided that "the notice [of election] shall distinctly specify the places which are candidates in the forthcoming election." It is contended that each of these provisions of the Act was flagrantly violated. It is conceded, first, that an election proclamation was not issued by the board of county commissioners of Chouteau county

prior to the election of July 6, 1907; and, second, that the notice of election did not contain the name of any place which was a candidate for the location of such school, and did not mention in any manner the fact that the location of the school would be voted upon. But it is said by the attorney general: "The election in question was a special election authorized and governed by a special law, and the general election laws of the state can have no application so far as the proceedings are directed by said special law."

It is true that the Act of 1907 provides for the particular notice of election which must be given, its contents, and the time and manner of its promulgation; also the form of the ballot to be used, and the mode by which the electors shall express their views upon the question submitted. But these are the only provisions found in the Act, and the declaration of section 3, that "said election shall be conducted in accordance with the general election laws of the state," must be held to mean that the provisions of the general election laws are applicable to such an election, except only in so far as they are superseded by the special provisions of this Act.

We think it can hardly be said that the notice of election takes the place of the election proclamation. The notice of election need only be published in the official paper in the county; while the proclamation must not only be published, but must be posted at every voting place for at least five days before such election. (Pol. Code, sec. 1163.) While the legislature might have provided that the publication of the notice of election would be ample to give all interested sufficient notice of such election, or might have provided for posting such notice of election at every voting place, it did not do so. We are required by generally accepted rules of statutory construction to give some meaning to the provision of section 3 last above quoted. That provision seems plain to us, and must be held to be applicable and binding upon the board of county commissioners in this instance.

The evident purpose of requiring an election proclamation to be issued is to give greater publicity to the fact that an election is to be held. Even if we doubted the wisdom of the legislature in making this requirement, that would be a matter of no concern; for in construing statutes the courts are not at liberty to question the legislative wisdom or policy. The provisions of the Act are plain, and work no hardship upon the officers who are required to obey them.

The notice of election is admittedly defective. It fails to give the name of the place which was a candidate for the location of the school, as required by section 3 of the Act, or to mention the fact that the location of such school would be voted upon.

But it is contended that the provisions of section 3 are directory, and that the election ought not to be set aside because of the informality of the notice. It is a general rule of law "that an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election." (1 Dillon on Municipal Corporations, sec. 197, note 3.) And while it is generally conceded that there is a distinction between general elections, the time for which is fixed, and special elections, the time for which must be determined by some board or officer, and that provisions of law respecting the notice of election for a general election will be held directory only, while such provisions respecting a special election will be held to be mandatory, still for the purposes of this argument we may admit, without deciding, that the provisions of section 3 above are directory only; but such an admission does not imply that the officers may wholly disregard such provisions, or substitute something altogether different in lieu of their requirements. It only means that a substantial, as distinguished from a strictly technical, compliance with those provisions will be insisted upon. In this instance we do not think that the notice given even substantially complies with the requirements of the Act; and when we remember that it is admitted that "because of the failure of said board of county commissioners to proclaim the said pretended special election or

to publish or post any proclamation thereof, and because of the failure of the said clerk of said county to give proper notice of said election, or of the candidate for the location of said county free high school, or of the fact that the question of the location of said high school would be submitted at said election, no election was held, nor were any polls therefor opened, nor any votes thereon cast, at one-third of the voting precincts of said county of Chouteau hereinabove named, and by reason thereof a large number of the qualified electors of said county, to wit, about one thousand qualified electors thereof, were prevented from attending or voting at said pretended election," we think it would be asking altogether too much to hold that the qualified electors of Chouteau county were given that opportunity freely and fairly to express themselves which our election laws contemplate.

For the failure of the board to make the required proclamation and to give it due publicity, as required by law, and for the failure of the county clerk to give notice of such special election in substantial conformity with the requirements of the Act of 1907, we hold that the election of July 6, 1907, was void, and that the tax levy for high school purposes is invalid, assuming that the allegations of this complaint are true, as admitted by the demurrer. The judgment of the district court is reversed, and the cause is remanded, with directions to vacate the order heretofore made and overrule the demurrer to the complaint. *Remittitur* forthwith.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

LEARY, RESPONDENT, v. ANACONDA COPPER MIN. CO.,
APPELLANT.

(No. 2,449.)

(Submitted November 7, 1907. Decided November 18, 1907.)

[92 Pac. 477.]

Master and Servant—Personal Injuries—Instructions—Contributory Negligence—Assumption of Risk—Safe Appliances—Evidence—Custom.

Master and Servant—Personal Injuries—Instructions—Contributory Negligence—Definition.

1. It was error to instruct the jury, in an action by an employee to recover damages from his employer for personal injuries, that contributory negligence constituted "such negligence upon the part of the plaintiff that, but for the same, he would not have been injured." The court in this instruction omitted from the definition a statement that such negligence must have concurred or co-operated with the negligent act of the defendant as a proximate cause of the injury complained of.

Same—Contributory Negligence—Proximate Cause—Instructions.

2. Where plaintiff, a miner, claimed to have been injured by the falling of timber through a chute in which it was being hoisted to an upper level of the mine, the court erred in charging the jury that, if plaintiff could, in the exercise of reasonable care, have stepped into a position of safety, but, instead of doing so, remained exposed in a position of greater hazard and danger than was necessary, and such conduct on his part contributed to, and was the proximate cause of, his injury, he could not recover,—since, by the use of the definite article "the," instead of the indefinite "a," the jury may have been misled into believing that plaintiff's right to recover damages was not barred unless his negligence was the sole causal agency in producing the injury.

Same—Assumption of Risk—Instructions.

3. A servant, by virtue of his contract of employment, not only tacitly agrees to assume such risks as are incident to his employment, but also such as should become apparent to him by ordinary observation, or are readily discernible by a person of his age and capacity, and such as he discovers but fails to call to the attention of his employer; hence, an instruction that the risks assumed by the servant, as ordinarily incident to the character of his work, were only such as an ordinarily reasonable man, with his experience, could or might have, in the exercise of ordinary diligence and observation, discovered, announced an erroneous principle of law.

Same—Safe Appliances—Duty of Master—Instructions.

4. With respect to the appliances furnished the servant by the master, the latter owes the former the duty only of exercising ordinary care, and to keep them in a reasonably safe condition; therefore, an in-

struction that it was the duty of defendant mining company to provide a reasonably safe and sufficient rope and chute with which and through which to hoist timbers, to make reasonable inspection thereof, to use ordinary care in so doing, and that defendant was liable if its inspection failed to discover what a reasonable examination would have disclosed, was erroneous.

Same—Appliances—Inspection—Instructions.

5. The court charged that, even though the workmen employed about that portion of the mine where plaintiff was injured, or the timbermen, could have inspected the chute or rope, the alleged defect in which caused the injury, and, if they had found either insufficient or unsafe, could have reported the same, when defendant would have furnished a new rope or repaired the chute, this would not constitute a defense if the chute was not reasonably safe, and plaintiff, by reason thereof, sustained damage without fault on his part and without knowing the risk, but such matters, with other facts and circumstances, might be considered by the jury in determining what would be a reasonable inspection, and whether defendant performed its duty to inspect. *Held*, that the instruction placed too great a burden on defendant company in the way of responsibility to its servants and practically amounted to a statement that plaintiff could recover in any event.

Same—Evidence—Custom of Miners.

6. In an action for injuries to a miner by a timber falling while being hoisted through an alleged defective chute by means of a faulty rope, evidence that, where a signal is given to hoist a timber through a raise, it is the general custom among miners for the man giving the signal to stand clear, was admissible.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by Dennis P. Leary against the Anaconda Copper Mining Company. From a judgment for plaintiff and an order denying it a new trial, defendant appeals. Reversed and remanded.

Mr. A. J. Shores, Mr. C. F. Kelley, and Mr. D. Gay Stivers, for Appellant.

Instruction No. 3 was erroneous. (*Baltimore etc. Ry. Co. v. Young*, 153 Ind. 163, 54 N. E. 793; *Cooper v. Georgia C. & N. Ry. Co.*, 61 S. C. 345, 39 S. E. 543; *Plant Inv. Co. v. Cook*, 74 Fed. 503, 20 C. C. A. 625; *Mulligan v. Montana Union Ry. Co.*, 19 Mont. 135, 47 Pac. 795; *Shearman and Redfield on Negligence*, sec. 96; *Thompson on Negligence*, sec. 3, p. 1148; *Cummings v. Helena & L. S. & R. Co.*, 26 Mont. 435, 68 Pac. 852.)

That the giving of instruction No. 6 was error, see *Gibson v.*

Erie Ry. Co., 63 N. Y. 452, 20 Am. Rep. 552; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Alcorn v. Chicago & A. Ry. Co.*, 108 Mo. 81, 18 S. W. 188; *Jackson v. R. R. Co.*, 104 Mo. 448, 16 S. W. 413; *Shearman and Redfield on Negligence*, 4th ed., sec. 185; *Wood on Master and Servant*, 758 et seq.; 2 *Thompson on Negligence*, 1008; *Hewitt v. Railroad Co.*, 67 Mich. 61, 34 N. W. 659; *Hayden v. Manufacturing Co.*, 29 Conn. 548; *Gibson v. Railway Co.*, 63 N. Y. 449, 20 Am. Rep. 552; *Moulton v. Gage*, 138 Mass. 390; *Ladd v. Railroad Co.*, 119 Mass. 412, 20 Am. Rep. 331; *Lovejoy v. Railway Co.*, 125 Mass. 79, 28 Am. Rep. 206; *Hulett v. Railroad Co.*, 67 Mo. 239; *Smith v. St. Louis etc. R. R. Co.*, 69 Mo. 32, 33 Am. Rep. 484; *Kean v. Rolling Mills*, 66 Mich. 277, 11 Am. St. Rep. 492, 33 N. W. 395; *McGinnis v. Bridge Co.*, 49 Mich. 466, 13 N. W. 819; *Hathaway v. Railroad Co.*, 51 Mich. 253, 47 Am. Rep. 569, 16 N. W. 634; *Ft. Wayne etc. R. R. Co. v. Gildersleeve*, 33 Mich. 133; *Davis v. Railroad Co.*, 20 Mich. 105, 4 Am. Rep. 364; *Indianapolis etc. R. R. Co. v. Love*, 10 Ind. 554; *Lake Shore etc. R. R. Co. v. McCormick*, 74 Ind. 440; *Smith on Negligence*, 131, 133; *Darracutts v. Railroad Co.*, 83 Va. 288, 5 Am. St. Rep. 266, 2 S. E. 511; *Beach on Contributory Negligence*, secs. 138, 139; *Lockwood v. Railway Co.*, 55 Wis. 50, 12 N. W. 401; *Hutchinson v. Railway Co.*, 5 Ex. 343; *Skipp v. Railway Co.*, 9 Ex. 223; *Assop v. Yates*, 2 Hurl. & N. 768; *Williams v. Clough*, 3 Hurl. & N. 258; *Gaffney v. Railroad Co.*, 15 R. I. 456, 7 Atl. 284.

The mere occurrence of an injury raises no presumption of negligence. What plaintiff must show to authorize a recovery, see 20 Am. & Eng. Ency. of Law, pp. 86, 87, and cases cited; *Labatt on Master and Servant*, secs. 832, 833; *Hamelin v. Malster*, 57 Md. 287; *Atchison etc. Ry. Co. v. Ledbetten*, 34 Kan. 326, 8 Pac. 411; *Patton v. Texas & P. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Bahr v. Lombard Co.*, 53 N. J. L. 233, 21 Atl. 190; *Robinson v. Charles Wright Co.*, 94 Mich. 283, 53 N. W. 938.

Where a servant voluntarily and needlessly assumes a position of peril, and is injured, he cannot recover therefor, although

at the time of the injury the master was negligent in the discharge of the duties which he owed to the servant. (20 Am. & Eng. Ency. of Law, 145; *Martin v. B. & Ohio Ry.*, 41 Fed. 125; Labatt on Master and Servant, sec. 334; *Atchison etc. Ry. Co. v. Tindall*, 57 Kan. 719, 48 Pac. 12; *Coyle v. Pittsburg Ry. Co.*, 155 Ind. 429, 58 N. E. 546.)

In the absence of affirmative and positive proof of negligence, the simple fact of an accident and injury would rather be attributable, presumably, to misadventure, inevitable accident, or other causes for which defendant would not be liable. (*Schultz v. Pacific R. R.*, 36 Mo. 13; *Nolan v. Shickle*, 3 Mo. App. 304; *Mitchell v. Chicago etc.*, 51 Mich. 236, 16 N. W. 388; *McGrell v. Buffalo*, 153 N. Y. 265, 47 N. E. 305.)

Mr. John J. McHatton, for Respondent.

Instruction No. 3 allows for the existence of negligence on the part of defendant, but advises the jury that if the plaintiff had not been negligent, the injuries to him would not have happened. It is directly applicable, under the facts and the pleadings.

The instruction is in accord with the doctrine cited by the appellant from Shearman and Redfield on Negligence. The cause of the event and the production of the injury may be, and usually are, matters for separate consideration. The instruction does not refer to the cause of the event, but to the happening of the injury and plaintiff's connection therewith. The defendant did not request any additional or more complete instruction, and, therefore, cannot complain. (*Gillies v. Mining Co.*, 32 Mont. 320, 80 Pac. 370; *Mulligan v. Montana Union Ry. Co.*, 19 Mont. 135, 47 Pac. 795; *Coleman v. Perry*, 28 Mont. 1, 72 Pac. 42; *Hardesty v. Lumber Co.*, 34 Mont. 153, 86 Pac. 29; *Thomas v. B. & M. Co.*, 34 Mont. 370, 86 Pac. 499, 87 Pac. 972; *Cannon v. Lewis*, 18 Mont. 402, 45 Pac. 572; *Mantle v. Largey*, 26 Mont. 554, 71 Pac. 1131.) The instruction is in no wise in conflict with anything said in *Wastl v. Montana Union Ry. Co.*, 24 Mont. 175, 61 Pac. 9. On the contrary, it is

entirely consistent therewith. It in no wise advises the jury that the plaintiff's negligence should be the sole cause; on the contrary, it advises that it must be a proximate contributing cause; one without which the injury would not have happened.

The decision in the case of *Wastl v. Montana Union Ry. Co.*, 24 Mont. 175, 61 Pac. 9, has no application to the error alleged in instruction No. 22, *first*, because the answer in this case pleads that it was wholly on account of the negligence of the plaintiff in not obeying the rule and not seeking a place of safety that he was injured, and the instruction is in accord with that theory, and by reason of estoppel; *second*, because there is no evidence of contributory negligence.

The criticism of instruction No. 6 is not justified. The word "and" used in the instruction plainly means "additional risk"; it is in effect the same as the use of the word "also"; it is not a limitation; the use of the word "or" would indicate a limitation; it would tend to advise the jury that even though the risk was an ordinary incident of the work, still if it was not known it would not be assumed.

An employee does not assume the risk of danger of which he does not know. (*McCabe v. Montana Cent. Ry. Co.*, 30 Mont. 323, 76 Pac. 701.) The question of whether or not a proper inspection was made is for the jury. (*Felton v. Bullard*, 94 Fed. 781, 37 C. C. A. 1.) It is the duty of the master to inform a servant of danger. (*Mathers v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464.) The master is required to make a reasonable inspection and to keep the appliances reasonably safe. (*Texas etc. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188.) And the defendant is liable if its inspection fails to discover what a reasonable examination would discover. (*Union Pac. Ry. Co. v. Snyder*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597.) A master cannot delegate the matter of providing suitable appliance or inspection and excuse himself. (*Walkowski v. Penoke etc. M. Co.*, 41 L. R. A. 115, notes; *N. P. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843-845, 40 L. Ed. 994; *Baltimore & O. Ry. Co. v. Baugh*, 149 U. S. 368, 13 Sup.

Ct. 914-921, 37 L. Ed. 772.) Custom furnishes no excuse if the custom itself is negligent. (*Austin v. Chicago etc. Ry. Co.*, 93 Iowa, 236, 61 N. W. 849; *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605; *Bean v. Oceanic Co.*, 24 Fed. 124; *Nyback v. Lumber Co.*, 109 Fed. 732, 48 C. C. A. 632; *Homestake Min. Co. v. Fullerton*, 69 Fed. 923, 16 C. C. A. 545.) An instruction absolving the master when he complies with common usage was properly refused. (*Martin v. California Ry. Co.*, 94 Cal. 326, 29 Pac. 645; *Redfield v. St. Ry. Co.*, 112 Cal. 220, 43 Pac. 1117.)

MR. JUSTICE SMITH delivered the opinion of the court.

This case involves an appeal from a judgment entered in favor of the plaintiff and against the appellant in the district court of Silver Bow county, and also an appeal from an order denying the defendant's motion for a new trial.

The action was brought for the purpose of recovering damages from the defendant company for personal injuries alleged to have been suffered by the plaintiff while in the employ of the defendant company as a miner, by reason of the negligence and carelessness of defendant in furnishing improper, unsuitable and unsafe appliances to the plaintiff with which to carry on the plaintiff's employment. It is alleged in the complaint, in substance, that the plaintiff was engaged in fastening a rope to certain timbers in the mine, by means of which rope the timbers were hoisted by an engine above, through a certain chute, to one of the upper levels in the mine, and that, by reason of the faulty construction of the chute, one of the timbers so fastened by plaintiff caught upon the projecting sides of the chute, whereupon the rope broke and the timber fell back to the place where plaintiff was standing, and injured him.

All of the affirmative allegations of the plaintiff which tended to show negligence or want of ordinary care on the part of the defendant were put in issue by the answer, and, in addition thereto, the defendant alleged that plaintiff had assumed the risks ordinarily incident to his employment, and was guilty of

contributory negligence which tended directly and proximately to cause the injury complained of. These latter affirmative allegations of the answer were denied by the plaintiff in his reply. The cause was tried to a jury, and plaintiff had a verdict, upon which the court entered a judgment in his behalf.

Appellant complains of instruction No. 3, given by the court. It is as follows: "Contributory negligence would be such negligence upon the part of the plaintiff that, but for the same, he would not have been injured."

Contributory negligence is thus defined in Beach on Contributory Negligence, 2d ed., section 7: "Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of." We approve this definition. The instruction complained of is erroneous. It fails to tell the jury of that concurring or co-operating negligence of the plaintiff which may have been a contributing proximate cause of his injury. (See *Wastl v. Montana Union Ry. Co.*, 24 Mont. at p. 175, 61 Pac. 9.) However, if this were the only erroneous instruction given, we should be inclined to the opinion that its vice was cured by other instructions on the same subject.

Instruction No. 22 is also attacked. That instruction reads thus: "You are instructed that one who is working in a place wherein, or with machinery or appliances by which, he is exposed to danger, must exercise his faculties for his own protection so far as his proper attention to his duties will permit; and, if he fails to do so, and is injured in consequence thereof, he is guilty of such negligence as will preclude a recovery of [for] such injury. And in this case, if you find that the plaintiff, while performing the duties of his employment, could, in the exercise of a reasonable degree of care and prudence have stepped into a position of safety, and that he needlessly remained exposed in a position of greater hazard and danger than was necessary in carrying out the duties of his employment,

and if you so find that by so placing himself in a position of greater peril than was necessary, such conduct on the part of the plaintiff contributed to, and was *the* proximate cause of, his injury, you are then instructed that the plaintiff cannot recover in this action, and your verdict must be for the defendant." This instruction is erroneous for the reasons pointed out in the *Wastl Case*, *supra*, where a similar instruction was held bad. True, the objection, while entirely logical, is a technical one, and as the other instructions given by the court were much more comprehensible than those given in the *Wastl Case* we should be loath to reverse this case on account of this instruction alone.

But the appellant complains of Instruction No. 6, which reads as follows: "You are instructed that a servant only assumes the risk of danger which is ordinarily incident to the character of work which he is engaged in performing, and such as an ordinarily reasonable man, with his experience, could have, or might have, in the exercise of ordinary diligence and observation, discovered." This instruction does not embody a correct principle of law. It is impossible to read the language employed without arriving at the conclusion that the jury were told thereby that the doctrine of assumed risk involved but one proposition, to-wit, that the servant *only* assumed the risks ordinarily incident to the character of his employment, and, as qualifying and restricting that obligation, only such as a reasonable man with his experience could have or might have, in the exercise of ordinary diligence and observation, discovered. A servant tacitly agrees, by virtue of the contract of employment, to encounter and assume the ordinary risks incident to the service. (*Cummings v. Helena & L. S. & R. Co.*, 26 Mont. 434, 68 Pac. 852.) The court, by instruction No. 6, told the jury that the risks assumed by the servant as ordinarily incident to the character of his work, were only such as an ordinarily reasonable man, with his experience, could have or might have, in the exercise of ordinary diligence and observation, discovered.

Judge Bailey, in his work on Personal Injuries Relating to Master and Servant, in section 459, lays down the rule thus: "The rule embraces within its scope not only such risks as are incident to the business, but such risks as should become apparent to the employee by ordinary observation or are readily discernible by a person of his age and capacity, in the exercise of ordinary care, or where his means of knowledge are equally as great as those of his employer, or if he discovers the unusual risk and makes no complaint. In such circumstances even extraordinary risks may assume in legal effect the shape and proportions of only ordinary and incidental perils, adding nothing to the liability of the master and affording the servant no additional grounds for recovery in the event of injuries received."

A partial statement of the rule is found in *McCabe v. Montana Central Ry. Co.*, 30 Mont. 323, 76 Pac. 701, where this court said: "The authorities hold that the plaintiff is to be held as having assumed the ordinary risks of the business, but not any extraordinary risks, unless it appear that he was aware of such at the time of his employment, or that, upon learning of their existence, he continued in the employment after the lapse of a reasonable time for the defects to be remedied or removed."

It was decided in *Coulter v. Union Laundry Co.*, 34 Mont. 590, 87 Pac. 973, that where a servant knows of the danger in prosecuting the master's work, "or if it is so patent that an ordinarily prudent man would have seen it, and he continues in the employment, without complaint, or without assurance of the master that the danger will be lessened or obviated, he cannot hold the master liable for injuries received in such employment, and the rule is the same with respect to those risks which first arise or become known to the servant during the service, as to those in contemplation at the original hiring." (Quoting 20 Am. & Eng. Ency. of Law, 2d ed., p. 124. See, also, 1 Labatt on Master and Servant, p. 643, sec. 274a.)

It is argued by counsel for appellant that the court erred in giving instruction No. 12, as follows: "You are instructed that

it was the duty of the defendant to provide a reasonably safe and reasonably sufficient rope and chute with which and through which to hoist timbers, and to make reasonable inspection thereof, and to keep the same reasonably safe, and to use ordinary care in so doing, and that this duty could not be delegated to others of its employees, so as to relieve it from responsibility in case of injury to the plaintiff, resulting from negligence to perform this duty; and, in this respect, you are charged that the defendant is liable if its inspection failed to discover what a reasonable examination would have disclosed and plaintiff was injured by reason of its negligence." This instruction is silent on the question of the proximate cause of the injury to plaintiff. Neither does it cover the question of contributory negligence. But these defects are probably cured by other instructions. In addition to these points urged by counsel, the instruction is bad as not a correct statement of the defendant's duty to plaintiff, as laid down in the case of *Anderson v. Northern Pac. Ry. Co.*, 34 Mont. 181, 85 Pac. 884.

Instruction No. 19 is objected to. It reads: "The jury is instructed that even though you may believe from the evidence that any of the miners or workmen who were employed about that portion of the mine where the injury to the plaintiff occurred, or any of a crew of timbermen, or other employees of the defendant had the right to or could have inspected the chute or slide or rope in question, and, if they found that the same was insufficient or unsafe or in the condition claimed by the plaintiff in the complaint, they could have reported the same, and that, upon the reporting of the same, the defendant would have furnished a new rope, or would have changed or repaired, if necessary, said chute or slide, this would not constitute any defense to this action or exonerate the defendant from liability, if the jury find that said chute or slide, or said rope, was not reasonably safe, and that the plaintiff, by reason thereof, sustained damage, without fault on his part and without knowing or assuming the risk of the injury which he sustained. But these

matters should, together with all the other facts and circumstances proved on the trial, be considered by you in determining what would be a reasonable inspection under the circumstances, and whether or not the defendant performed its duty to the plaintiff in the matter of inspection." This instruction undoubtedly places too great a burden upon the defendant in the way of responsibility to its servants, and amounts almost to a statement that the defendant must compensate the plaintiff in any event.

Other instructions are objected to and are, standing alone, objectionable; but we are not prepared to say that, in the aggregate and read together, they may not have sufficiently covered the issues substantially correctly, and we should hesitate to reverse the case on account of them. But instruction No. 6, above considered, is wrong, and is not, and could not be, cured by any other instruction.

Plaintiff contends that the defense of assumption of right is not properly pleaded; but we think it is.

The only other point necessary of consideration in view of the fact that there must be a new trial relates to the admissibility of certain evidence. Defendant offered to prove "that it was a general custom among miners employed underground, and it was understood by all miners as being reasonable and prudent, that, where a signal was given to hoist a timber through a raise, the man who gave the signal stood clear away, so that, if the timber came back, he could not be caught." The evidence was objected to, and the court sustained the objection. We think this testimony was competent. Wigmore, in his work on Evidence (section 461, volume 1), says: "This conduct of others, then (1) is receivable as some evidence of the nature of the thing in question, because it indicates what is the influence of the thing on the ordinary person in that situation; but (2) it is not to be taken as fixing a legal standard for the conduct required by law." (See, also, 1 Thompson's Commentaries on Law of Negligence, sec. 30; *Sullivan v. Jernigan*, 21 Fla. 264.)

The judgment and order of the district court of Silver Bow county are reversed, and the cause remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. MISH, APPELLANT.

(No. 2,444.)

(Submitted November 5, 1907. Decided November 18, 1907.)

[92 Pac. 459.]

*Criminal Law—Attempt to Commit Burglary—Information—
Sufficiency—Degree of Crime—Determination by Court—
Sentence—Appeal—Presumptions.*

Criminal Law—Burglary—Entry—Information.

1. Under Penal Code, section 820, providing that every person who enters any house, room, etc., with intent to commit grand or petit larceny or any felony, is guilty of burglary, the act of entry, to constitute the crime, must be itself a trespass; therefore the information should negative the idea that the defendant, at the time of entry, had the right to enter.

Same—Burglary—Entry—Ownership of Building—Information.

2. While the ownership of the room or building, charged in an information for burglary to have been entered by defendant, need not be specifically alleged, it is the safer practice to do so, if known to the pleader.

Same.

3. An information alleging that defendant "willfully, unlawfully and feloniously" attempted to "willfully, unlawfully and feloniously enter" a certain room in a lodging-house, with intent to commit larceny, sufficiently negated the idea that at the time of entry he had a right to enter, and stated facts sufficient to constitute an attempt to commit burglary.

Same.

4. Since under Penal Code, section 820, it is burglary to enter a house or room with intent to commit petit as well as grand larceny, the contention of appellant that the charge in the information referred to in the above paragraph, that accused attempted to enter "with intent to commit larceny," should be construed to mean petit larceny only, and that therefore the value of the articles sought to be stolen should have been alleged, has no merit.

Same—Degree of Crime—Determination by Court—Appeal—Record—Presumptions.

5. The jury, in finding a verdict of guilty of the crime of attempted burglary, left the punishment to be fixed by the court. While the crime of burglary is divided into first and second degrees, and in such case the jury must find the degree, an attempt to commit that offense is not so divided. The court, under section 1230, subdivision 1, Penal Code, imposed a sentence of seven and one-half years in the state's prison, one-half the maximum punishment authorized for the crime of burglary in the first degree. The evidence was absent from the record on appeal. *Held*, that in the absence of the testimony, it will be presumed that the court had evidence before it justifying a finding that, if guilty at all, the defendant was guilty of an attempt to commit burglary in the night-time, which constitutes the first degree of the offense, and that the punishment inflicted was proper. (Mr. Chief Justice Brantly dissenting.)

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

TOM MISH was convicted of an attempt to commit burglary, and appeals from the judgment of conviction. Affirmed.

Messrs. Maury & Hogevoll, for Appellant.

Mr. Albert J. Galen, Attorney General, and Mr. W. H. Poorman, Assistant Attorney General, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

The defendant in this case was convicted in the district court of Silver Bow county of an attempt to commit the crime of burglary, and appeals. His counsel contends that the information filed against him does not state facts sufficient to constitute a public offense, for "the reason that the information does not show that the room the defendant entered was not his own."

The charging part of the information is as follows: "That at the county of Silver Bow, state of Montana, on or about the 13th day of January, A. D. 1906, and before the filing of this information, the said defendant, Tom Mish, did willfully, unlawfully, and feloniously attempt to willfully, unlawfully, and feloniously enter that certain room numbered 59, in that certain house known as the 'Mullin House,' situate in Centerville, Silver

Bow county, state of Montana, with the intent then and there and therein willfully, unlawfully and feloniously to commit larceny."

Our Penal Code, section 820, reads thus: "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, with intent to commit grand or petit larceny or any felony is guilty of burglary." Burglary, as a common-law offense, was the breaking and entering of the dwelling-house of another, in the night-time with intent to commit a felony therein, whether the felony was committed or not. (*State v. Copenhagen*, 35 Mont. 342, 89 Pac. 61.) It was an offense against the habitation, and not against the property. (6 Cyc. 172; *State v. Morrissey*, 22 Iowa, 158.) But the attorney general contends that the nature of the entry is not material. He says in his brief: "The ownership of the building entered, and the ownership and value of the goods, are immaterial, except as matters of description. And if a man enters his own house for the sole purpose, and with the criminal intent, to steal the goods of another therein, he is guilty of burglary. At least, if the defendant at the time had the legal right and authority to enter the house, it is a defense, and not a matter of pleading."

The opinion of the court in *People v. Barry*, 94 Cal. 481, 29 Pac. 1026, seems to support this contention. In that case the defendant was convicted of burglary in having entered a grocery store, by the public entrance, during business hours, with intent to commit larceny. The following instruction was requested by the defendant and refused, to wit: "The defendant cannot be convicted of the crime if he had a right to enter the store of Murry & Seegelkin at the time alleged in the information, even if you believe from the evidence that at the time he entered he intended to commit larceny." The California statute defining burglary is identical with our own. The court in that case said: "Even under the present section of the Penal Code, many acts constitute burglary which but a few years ago were a different offense, or no offense whatever.

As to the acts which shall constitute the crime of burglary, that is a matter left entirely to the policy of the Legislature, within its constitutional powers; and, when that body has said that every person who *enters a store* with the *intent* to commit larceny is guilty of a burglary, the language is so plain and simple that rules of statutory construction are not required to be consulted. The meaning is patent upon the face of the statute. No words are found in the statute qualifying the character, kind, time or manner of the entry, save that such entry must be accompanied with a certain intent; and it would be judicial legislation for this court to interpolate other conditions into the section of the Code." Four of the justices concurred in the opinion on this branch of the case, and three dissented. Mr. Justice De Haven, in dissenting, said: "I concur in the judgment, but dissent from so much of the opinion of Mr. Justice Garoutte as seems to hold that one who enters the store of another with intent to commit larceny therein is guilty of burglary, although the entry was open, and with the actual and free consent of the owner. I do not think that this is a correct interpretation of our statute defining the offense of burglary. I think, in order to constitute a burglarious entry, the act of entering must be itself a trespass—an intrusion into the building alleged to have been entered, an entry without the consent of the owner. (*State v. Moore*, 12 N. H. 42.)"

In the case of *State v. Moore*, 12 N. H. 42, above referred to, the defendant was convicted of burglary for having entered the barroom of a public inn while he was a guest at the inn, with intent to steal money from the cash box. The court, in setting aside a verdict of conviction, said: "The act of stealing is evidence of the intent to steal; but is hardly sufficient to rebut the presumption that where he lawfully entered he entered for a lawful purpose. To hold that, for a lawful entry, a party could be punished, because, after such entry, he does an unlawful act, would be to find him guilty of a crime by construction, a result which the law, in its endeavors always to ascertain the real intention of the accused, invariably, in theory, avoids, and which

has seldom, in modern times, happened in practice. A case is put by Lord Hale, the reasoning of which is analogous to that we have used in this case. 'It is not a burglarious breaking and entry if a guest at an inn open his own chamber door, and takes and carries away his host's goods, *for he has a right to open his own door*, and so not a burglarious breaking.' (1 Hale's Pleas of the Crown, 553, 554.) If a burglary could not be committed because the party has a right to open his own door, notwithstanding the subsequent larceny, the same principle would seem to be applicable here, where the prisoner had a right to enter the house, and where, by parity of reasoning, his subsequent larceny would not make his original entry unlawful."

Thus, it will be seen that these two cases embody the question we are considering, and decide it in different ways. We agree with the opinion of Judge De Haven, that, in order to constitute a burglarious entry, the act of entry must be itself a trespass. It may be that a man may burglarize his own house by entering therein, at a time when he has no right to enter, with intent to commit petit larceny or any felony. But, when the entry is lawful, what crime does he commit by simply having a felonious intent to steal? Our Code says that in every crime there must exist a union or joint operation of act and intent. If the act of entry by the accused is rightful, and the intent to steal is never executed, of what is he guilty? The fallacy of any other conclusion is brought forcibly to us when we consider that in the present case the defendant is simply accused of an attempt to commit burglary. Assume that the room was his own, and that, at the time, he had a right to enter it. He is then accused of attempting to do a lawful act with an unlawful intent, to be thereafter executed. The union of act and intent is wanting. If this is attempted burglary, wherein does it differ, in its elements, from an attempt to commit larceny? But the California court says, in effect, that the legislature has the power to declare a lawful entry with an unlawful intent burglary. Without deciding whether the legislature has the power to declare an act which is not *malum in se* unlawful, except in the reasonable

exercise of the police power, we are of opinion that the legislature in enacting our burglary statute had no such intention. It may be presumed, we think, that the legislature, in defining burglary and larceny, had in mind the common-law elements of those crimes, and intended to punish two different classes of offenses, and two offenses analogous at least, to the common-law offenses. Therefore they used the terms "burglary" and "larceny."

The case at bar is somewhat different from either the California case or the one from New Hampshire, because it may be argued that no man has a right to enter either a grocery store or a barroom of another for an unlawful purpose; but a man may lawfully enter his own house or room at any time, provided he has not parted with the right to enter at that particular time, and the unlawfulness of his intentions with regard to acts contemplated by him after entry cannot, in a criminal case, characterize the rightful act of entry. (See note to *The Six Carpenters' Case*, 1 Smith's Leading Cases, Part 1, 259-264.)

We hold that the information should negative the idea that the defendant at the time of entry had the right to enter, or, in other words, should show that the entry was a trespass. It does not necessarily follow that the ownership of the room or building must be specifically alleged, although, where this is known to the pleader, it would be the safer practice to do so. The name of the person having the right of possession, other than the defendant, may be alleged, or, in the absence of such allegation, terms should be employed indicating that the defendant at the time of entry was a trespasser. (*Wilson v. State*, 34 Ohio St. 199; *Beall v. State*, 53 Ala. 460.) In the case of *Commonwealth v. Perris*, 108 Mass. 1, it was held that under a burglary statute that was silent as to the ownership of the building, the charge must aver that the building was the property of another than the defendant. We think, however, that a wrongful entry is all that is necessary to be alleged and proved under our statute.

In the case at bar the defendant is accused of willfully, unlawfully, and feloniously attempting to willfully, unlawfully,

and feloniously enter room 59 in the Mullin House. We think this is sufficient, although any extension of the license to so plead might be fraught with danger. However, it is impossible to conceive that the defendant could unlawfully enter a room without committing a trespass.

Again, it is urged by appellant that he is charged with having intended to commit larceny, and that this should be construed as an attempt to commit petit larceny only. He cites the case of *Territory v. Duncan*, 5 Mont. 478, 6 Pac. 353, where this court held that, in order to constitute the crime of burglary in the daytime, there must be a breaking and entering with intent to commit a felony, and consequently the facts which make up the constituent elements of the felony and which show the intent to commit the same must be alleged. The court also held that an allegation that the entry was made with intent to commit grand larceny, without averring the value of the property intended to be stolen, was insufficient. The burglary statute under which the defendant in that case was prosecuted read: "Every person who shall break and enter any dwelling or other house, with the intent to commit murder, rape or robbery, or any other felony, in the daytime, shall be guilty of burglary." The court said: "It is not a felony and is not burglary, under this statute, to break and enter a dwelling-house in the daytime with intent to steal goods and chattels of less than \$50 in value." But our Penal Code (section 820 *supra*) makes it burglary to enter a house or room with intent to commit petit larceny, so that the *Duncan Case* has no application.

The jury returned the following verdict in this case: "We, the jury in the above-entitled action, find the defendant, Tom Mish, guilty of the crime of attempted burglary, and leave the punishment to be fixed by the court." The court imposed a sentence of seven and one-half years in the state's prison. Defendant's counsel argues that "the court could not find the degree of the crime," and consequently could not pronounce a lawful sentence. Burglary, under our Penal Code, is divided into two degrees, viz., burglary in the night-time, which is bur-

glary in the first degree and punishable by imprisonment in the state's prison for a term of from one to fifteen years; and burglary in the daytime, which is burglary in the second degree, and punishable by imprisonment in the state's prison for a term not exceeding five years. While burglary is distinguished into degrees, for the purpose of fixing the punishment, an attempt to commit burglary, while a crime, is not divided into degrees.

Section 1229 of the Penal Code reads, in part, as follows: "An act done with intent to commit a crime and tending but failing to effect its commission, is an attempt to commit that crime."

Paragraphs 1 and 2 of section 1230 of the Penal Code provide:

"1. If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, or by imprisonment in the county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in the county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so attempted.

"2. If the offense so attempted is punishable by imprisonment in the state prison for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year."

In charging burglary, it is not necessary to allege in the information the time of the entry (*State v. Copenhagen, supra*); but the jury, if they convict, must find the degree in accordance with section 2145 of the Penal Code. Section 2211 of the Penal Code provides that, upon a plea of guilty of a crime distinguished into degrees, the court must, before passing sentence, determine the degree. This provision, however, relates only to cases where a plea of guilty is entered. Neither the court nor jury could fix any degree of this crime because it has no degrees. The court fixed the punishment, and is presumed to have properly done so. The evidence is not before us. For aught we know, there was no controversy at the trial as to the time of

the alleged offense. The defendant may have admitted upon the witness stand that the acts committed by him, while not criminal, were, in fact, done between sunset and sunrise. We presume that there was evidence at the trial that justified the court in finding that, if the defendant was guilty at all, he was guilty of an attempt to commit burglary in the night-time. (*State v. Shepphard*, 23 Mont. 323, 58 Pac. 868; *State v. Gordon*, 35 Mont. 458, 90 Pac. 173.) The presumption is strengthened in this case by the fact that the court told the jury that, if they elected to fix the punishment, they could fix it at not exceeding one-half of the maximum punishment for burglary in the first degree, and no complaint is made of this instruction.

The judgment of the district court of Silver Bow county is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY: I dissent from that portion of the foregoing opinion, in which it is held that the verdict of the jury is sufficient.

Section 1229 of the Penal Code defines attempts. If there were a provision prescribing generally the punishment for such crimes, without reference to the punishments inflicted for the commission of the crimes themselves, a general verdict such as was returned in this case would be sufficient. Logically it would be responsive to every issue in the case. But section 1230, in adjusting the punishments to be imposed in such cases, does so with special reference to the punishments imposed for the consummated crimes. Now, burglary is distinguished into degrees; burglary in the night-time being of the first degree, and burglary in the daytime being of the second degree. (Pen. Code, sec. 820.) For the former the punishment is imprisonment in the state prison for not less than one nor more than fifteen years; for the latter like imprisonment for not more than five years. (Pen. Code, sec. 822.)

In charging the crime of burglary, it is sufficient to charge it generally, and leave the jury to find the degree upon the evidence (*State v. Copenhaver*, 35 Mont. 352, 89 Pac. 61), as under the statute they must do (Pen. Code, sec. 2145). This they must do whether they leave the punishment to be fixed by the court or not, and for the reason that the degree in such cases depends upon inferences to be drawn from disputed facts; and since the defendant is entitled to a trial by a jury, he is entitled to have the jury determine every issue of fact in the case. It must, then, logically follow that where the charge is an attempt to commit a crime which is distinguished into degrees, as in case of burglary, the charge may be made generally of an attempt to commit the crime, but the jury should find the degree of the crime which was attempted; otherwise, they cannot fix the punishment, as they may do. (Pen. Code, sec. 2150.) Section 1230, *supra*, prescribing the punishment to be imposed in such cases, requires a finding of this kind; for an attempt to commit burglary in the first degree is punishable under subdivision 1 of that section, and an attempt to commit burglary in the second degree is punishable under subdivision 2.

Section 2151, it seems to me, has no application to a case of this kind. It seems applicable to those cases only, excepting, of course, judgments rendered upon pleas of guilty, wherein the jury have made every finding necessary to enable them to fix the punishment, but cannot agree upon the extent of it within the limitations prescribed by the statutes. In such cases, if they fail or neglect to fix it, the court may declare it, but not otherwise. If they fail to make every finding necessary for this purpose, the court may not, in my opinion, hear evidence or examine the evidence submitted at the trial and make an additional finding of fact, and then determine under which subdivision of section 1230 the punishment should be administered. The verdict is not responsive to one of the material issues in the case.

The only authority I have found directly in point is the case of *People v. Travers*, 73 Cal. 580, 15 Pac. 293. With the conclusion stated therein I agree.

Rehearing denied December 11, 1907.

STATE EX REL. COLLIER, APPELLANT, v. HOUSTON, JUSTICE OF THE PEACE, RESPONDENT.

(No. 2,450.)

(Submitted November 7, 1907. Decided November 18, 1907.)

[92 Pac. 476.]

Justices of the Peace—Jurisdiction—Judgment—Postponement of Rendition—Effect.

Justices of the Peace—Jurisdiction.

1. Justices' courts are of limited jurisdiction, having only such powers as are conferred upon them by statute.

Same—Statutes—Procedure.

2. In the exercise of the powers granted to justices of the peace, they must pursue the statute, not only as to the classes of cases which they may hear and determine, but as to the procedure prescribed.

Same—Judgment—Postponement of Rendition—Effect.

3. Where a justice of the peace, after submission of a cause to him for determination, took it under advisement, without the consent of the parties, appointing neither time nor place for the rendition of judgment, he lost jurisdiction, and the judgment, rendered about a month thereafter, without notice to the parties, was void. (Code Civ. Proc., sec. 1623.)

Same—Taking Case Under Advisement—When Permissible.

4. *Obiter*: While a justice of the peace may, with the consent of the parties, take a case under advisement, the adjournment of the trial, so brought about by stipulation, must be to a time and place appointed for that purpose, and an order to that effect entered upon his docket.

Appeal from District Court, Chouteau County; Jno. W. Tattan, Judge.

Certiorari by the state, on the relation of John Collier, against S. Houston, justice of the peace, to annul a judgment. From a judgment for defendant, relator appeals. Reversed.

Mr. W. B. Sands, and Mr. R. E. O'Keefe, for Appellant.

Citing: *Sluga v. Walker*, 9 N. Dak. 108, 81 N. W. 282; *Clark v. Read*, 5 N. J. L. 486; *Edwards v. Hance*, 12 N. J. L. 108; *Hall v. Reber*, 36 Ill. 483; *Brosde v. Sanderson*, 86 Wis. 368, 57 N. W. 49; *Brahmstead v. Ward*, 44 Wis. 591; *Crandall v. Bacon*, 20 Wis. 639, 91 Am. Dec. 451; *Brown v. Kellogg*, 17 Wis. 490; *Mahr v. Young*, 13 Wis. 635; *Gamage v. Law*, 2 Johns. 192; *Wiest v. Critsinger*, 4 Johns. 117; *Ruberts v. Hathaway*, 42 Mich. 592, 4 N. W. 307; *Scullen v. George*, 65 Mich. 215, 31 N. W. 841; *Hall v. Shank*, 57 Mich. 36, 23 N. W. 478; *Guthrie v. Humphrey*, 7 Iowa, 25; *Harrison v. Sager*, 27 Mich. 476; *Fox v. Meacham*, 6 Neb. 530; *Catlin v. Rundell*, 1 N. Y. App. Div. 157, 37 N. Y. Supp. 979; *Nicholson v. Roberts*, 6 Ohio Dec. 233.

Mr. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On November 3, 1905, J. L. Sprinkle commenced an action against the relator in the court of the defendant, a justice of the peace of Chinook township, Chouteau county. Issues having been joined by the parties, the cause was tried without a jury on December 18, 1905. At the close of the trial, but without the consent of the parties, the defendant took the cause under advisement, appointing neither time nor place for the rendition and entry of the judgment. Thereafter, on January 22, 1906, a decision was rendered in favor of the plaintiff, that he recover from the defendant \$70, with costs of suit, and judgment was then, or thereafter, entered upon defendant's docket accordingly. This was done apparently without notice to the parties. On July 30, 1906, an execution was issued and placed in the hands of a constable to collect the amount of the judgment. Thereupon the relator obtained from the district court a writ of *certiorari* to have the judgment annulled, on the ground that, by taking the cause under advisement for an indefinite time and failing to render judgment at the close of the trial, defendant lost jurisdiction, with the result that the judg-

ment was void. After a hearing, the district court concluded that the action of the justice was proper and affirmed the judgment. The relator has appealed.

The judgment of the district court is clearly erroneous. Justices' courts are of limited jurisdiction, having only such powers as are conferred upon them by the statute. (Const., Art. VIII. sec. 20; *Layton v. Trapp*, 20 Mont. 453, 52 Pac. 208; *State ex rel. Kenyon v. Laurandean*, 21 Mont. 216, 53 Pac. 536; *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695.) In the exercise of the powers granted, they must pursue the statute, for that is the charter of their powers, not only as to the classes of cases which they may hear and determine, but as to the procedure they must observe. A liberal construction must be given these statutes, however, with a view to effect their object and to promote justice. (Civ. Code, sec. 4652.)

The provision of the statute touching the rendition and entry of judgments by justices' courts when sitting without a jury is the following: "When the trial is by the court, judgment must be entered at the close of the trial." (Code Civ. Proc., sec. 1623.) In California it is held that such a statute is directory (*Heinlen v. Phillips*, 88 Cal. 557, 26 Pac. 366; *American Type F. Co. v. Justice's Court*, 133 Cal. 319, 65 Pac. 742, 978), and that a judgment rendered after a postponement, at the close of the trial, is valid. This view is founded upon the notion that, since no penalty is imposed for a violation of the statute, it may not be presumed that the legislature intended to put the parties to the expense of a retrial because the justice fails to observe it.

It is held by some courts that such a statute is mandatory, and that, if the justice fails to observe it, his judicial functions with respect to the particular case cease and the judgment is void. This is the rule in North Dakota and Wisconsin; the courts of these states holding that the statute must be obeyed literally. (*Sluga v. Walker*, 9 N. Dak. 108, 81 N. W. 282; *Hull v. Mallory*, 56 Wis. 355, 14 N. W. 374.) So in New York, where the statute requires the justice to render and enter his

judgment within four days after the close of the trial, he must do so. A judgment rendered after the lapse of this time is void. (*Catlin v. Rundell*, 1 App. Div. 157, 37 N. Y. Supp. 979; *Watson v. Davis*, 19 Wend. (N. Y.) 371; *Stephens v. Santee*, 49 N. Y. 35.) Also, in the case of *Stewart v. Waite*, 19 Kan. 218, the supreme court of that state, under a statute containing a like provision, held that a judgment entered after the lapse of four days from the close of the trial was void. The same rule is announced by the courts of Michigan, Iowa, and Nebraska. (*Harrison v. Sager*, 27 Mich. 476; *Guthrie v. Humphrey*, 7 Iowa, 23; *Fox v. Meacham*, 6 Neb. 530.)

Other courts, adopting a more liberal rule, hold that the justice may take the case under advisement for a reasonable time; but even these declare the rule that the adjournment must be had to a particular time and place, so that the parties may be present, if they desire, to know the result at the time, and thus be enabled to take such steps as may be deemed advisable in order to protect their rights. (*Clark v. Read*, 5 N. J. L. 560; *Edwards v. Hance*, 12 N. J. L. 108; *Harrison v. Chipp*, 25 Ill. 471; *Hall v. Reber*, 36 Ill. 483.)

In Oregon a justice may take a case under advisement indefinitely, without losing jurisdiction (*Saunders v. Pike*, 6 Or. 312); but it seems that in that state there is no statute such as the one now under consideration. We think the better rule to be that the justice may take a case under advisement if the parties consent. The stipulation for the adjournment is, in legal effect, a suspension of the trial for the time being, to be taken up again at the convenience of the parties. In such case, however, the adjournment must be to a time and place appointed, and an order to that effect entered upon the docket as is required when postponements are ordered by the justice or are allowed by consent of the parties, or for cause before the trial begins. (Code Civ. Proc., secs. 1591-1593, 1660.)

The obvious purpose of the provision is to have the controversy ended promptly, while the parties are present, so that they may be relieved of the necessity of attending the court to

ascertain the result, and thus be enabled promptly to take such further steps as may be necessary. It is most frequently the case that one, or both, of the parties live at a distance from the place of trial. They may not be put to the necessity of coming again to ascertain the result. The losing party may desire to pay the judgment and thus prevent accruing costs, or he may wish to appeal, and may be able at the time to perfect it, whereas, if the decision is delayed, he may be put to further trouble and expense. But, whether this be the purpose or not, the statute is the limit of the power, and even under the rule of construction declared by the statute, *supra*, its mandate must be obeyed. Any other interpretation of it leads to the conclusion that the justice may postpone the decision indefinitely; and, to prevent the consequences which might otherwise result, we should be required to say that a judgment rendered after an indefinite postponement would be valid, provided the justice should give notice to the parties of the time and place of its rendition. This would be judicial legislation; for the statute does not authorize the postponement, nor does it provide for notice, nor is there any other provision authorizing the one or requiring the other.

We are of the opinion that the justice lost jurisdiction of the case, and that the judgment rendered as it was is void.

The judgment of the district court is reversed, and the cause is remanded, with instructions to enter judgment for the relator.

Reversed and remanded.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

HOGAN, APPELLANT, v. CASCADE COUNTY, RESPONDENT.

36	183
38	586

(No. 2,446.)

(Submitted November 6, 1907. Decided November 18, 1907.)

[92 Pac. 529.]

Sheriffs—Deputies—Power of Appointment—County Commissioners—Statutes—Construction.

1. The Act of 1905, amendatory of section 4597 of the Political Code (Laws 1905, p. 164), providing, among other things, that the sheriff in a third-class county shall be allowed two deputies, and that such officer "may appoint two deputies * * * who shall act as jailers," does not, by the latter provision, create a new class of deputies, separate and distinct from those first referred to, or lodge in the sheriff exclusively the power of appointment without the consent or approval of the board of county commissioners, but simply amounts to an increase of the maximum number he may appoint, subject to the approval of the board, as provided by Act of 1893 (Sess. Laws 1893, p. 60), which Act was not repealed by implication by any provision of the Political Code, thereafter adopted.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

CLAIM by Ira D. Hogan against Cascade county for services alleged to have been rendered by him as jailer. From a judgment for defendant, plaintiff appeals. Affirmed.

Mr. A. C. Gormley, for Appellant.

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This cause was submitted to the district court upon an agreed statement of facts, after appeal to that court from a disallowance of plaintiff's claim by the board of commissioners of the defendant county. The facts are the following:

Edward Hogan at the dates hereinafter mentioned was the sheriff of Cascade county, it being a county of the third class. On March 11, 1907, he appointed the plaintiff one of his deputies, the special duty assigned to him being that of jailer. Another deputy had theretofore been assigned to this duty. The result of plaintiff's appointment was that the sheriff had two deputies who were serving as jailers. At that time the sheriff had, exclusive of the plaintiff and the undersheriff, four other deputies, one of these acting as jailer with plaintiff. The plaintiff was appointed to his office without the permission or approval of the board of commissioners of the county. All these deputies, other than plaintiff, were paid their salaries for the month of March. The plaintiff served as deputy and jailer from March 11th to 31st, both days inclusive. At the end of the month he presented to the auditor of the county his claim for salary. It was audited, and its payment recommended. Upon presentation to the board of commissioners the claim was disallowed. Thereupon the plaintiff appealed to the district court. After a hearing upon the foregoing facts, the court sustained the action of the board of commissioners and directed judgment to be entered for the defendant. Plaintiff has appealed.

The theory upon which the plaintiff's claim for his salary was disallowed was that the appointment was made without the consent or approval of the board of commissioners, and that his salary was therefore not a legal charge against the county. The plaintiff insists that, under the statute, the sheriff's power to appoint him, or any other deputy, for the special duty assigned to him, and thus to make the salary a valid charge against the county, was absolute. This contention is based upon the provisions of section 4597 of the Political Code, as amended by the Act of 1905 (Sess. Laws 1905, p. 164), which, so far as it is pertinent here, declares:

"The whole number of deputies allowed the sheriff is one undersheriff, and in addition not to exceed the following number of deputies; in counties of the first and second classes, six;

in counties of the third and fourth classes, two; in counties of the fifth, sixth, seventh and eighth classes, one."

"The sheriff in counties of the first, second and third classes may appoint two deputies, and in the fourth, fifth, sixth, seventh and eighth classes, one deputy, who shall act as jailers at a salary not to exceed ninety dollars per month."

The second paragraph takes the place of a paragraph of the older section, which provided: "The sheriff, undersheriff, or one of the deputies, must act as jailer; provided, that the board of county commissioners may allow jailers when in their judgment the same are necessary, and when so allowed, jailers must not be paid to exceed twelve hundred dollars per annum."

The argument is that, by the amendment of the Code provision, the legislature clearly manifested the intention to create a new class of deputies, separate and distinct from that referred to in the first part of the section in which the maximum number is fixed, and to lodge the power of appointment of them exclusively in the sheriff. This purpose, it is said, is manifest from the language of the amendment, that "the sheriff * * * may appoint two deputies," etc.

In *Jobb v. Meagher County*, 20 Mont. 424, 51 Pac. 1034, the legislation of the territorial and state governments from 1865 to the adoption of the Code, in 1895, on the subject of deputies, their number, and the mode of payment of their compensation was elaborately examined. It was there pointed out that, when the government adopted the policy of compensating public officers by fixed salaries payable by the respective counties, instead of by fees collected from the public for the performance of specific duties from time to time, a discretionary control over the number of deputies appointed by the various officers within the maximum named in the statute, and also over the amount of their compensation within the maximum amount named in each case, was lodged in the board of county commissioners. It was pointed out, further, that the provision of the Act of March 9, 1893 (Sess. Laws, 1893, p. 60), declaring this policy, was not repealed by implication by any of the provisions of the

Political Code fixing the compensation of public officers, declaring the maximum number of deputies each one might appoint, and the amount of compensation they were to receive. (Pol. Code, sec. 4591 et seq.) This Act declares: "The number of deputies and their compensation allowed to the county officers within the maximum limits named in this Act shall be determined by the board of county commissioners."

In the later case of *Penwell v. Board of County Commissioners*, 23 Mont. 351, 59 Pac. 167, the question was whether the board of commissioners of counties of the first and second classes had the power to fix the compensation of a deputy county attorney, or whether the salary to be paid to him was the maximum rate provided in the statute and became fixed by his appointment by the county attorney. (Pol. Code, sec. 4596.) It was held that, since there was no inconsistency between the Act of 1893, *supra*, so far as it pertained to the subject, and the provision of the Code allowing such deputies and fixing their compensation (Pol. Code, secs. 4596, 4602), the said Act (of 1893) was in force, and declared the intention of the legislature to lodge the power of fixing the compensation of these deputies in the board, even though the Act became a law when there was no provision for the appointment of such deputies.

This, then, was the settled policy of the legislature at the time section 4597, *supra*, was amended by the Act of 1905. The purpose and effect of the amendment must, therefore, be determined by an examination of the whole of the amendatory Act, and by a comparison of its provisions with the sections of the Code as they stood prior to its passage. It amends sections 4597 and 4602, which declared the maximum number of deputies to be allowed the sheriff and other county officers. In dealing with the subject of deputies of the county clerk, section 4597 allowed this officer in counties of the first and second classes, six; in counties of the third class, four; in counties of the fourth class, three; in counties of the fifth class, two; and in other counties, one. The amendment diminishes the maximum number allowed in counties of the third and fourth

classes by one. In other respects the number of deputies allowed is the same. In declaring the number of deputies allowed the clerk of the district court, it fixed the maximum for counties of the first and second classes at six, exclusive of a chief deputy, for counties of the third and fourth classes at three, and for other counties at one. Under the amendment, the maximum is the same for counties of the first and second classes. For counties of the third and fourth classes having more than one district judge the maximum is fixed at three; for counties of these classes having one judge the maximum is fixed at two, and for other counties it remains the same. So, under section 4602, the treasurer in counties of the fifth, sixth, seventh, and eighth classes could, in the discretion of the board, be allowed additional deputies during the months of October, November and December. Under the amended section, none may be allowed for the month of October. In other respects, the section remains the same. That it was the general purpose of the legislature to readjust the maximum number of deputies allowed to meet the actual conditions as they were supposed to exist in the various counties at the time of the amendment thus becomes clear.

In view of these considerations, are we justified in concluding that by the amendment of the portion of section 4597, relating to sheriffs' deputies, the legislature intended to change its policy with reference to the two deputies who are to serve as jailers, and conclude that, in appointing them, the sheriff is not subject to the discretionary control of the board? We think not. There is nothing in the amendment inconsistent with the provision in the Act of 1893, *supra*. It amounts to nothing more than an increase of the maximum number of the deputies which the sheriff may appoint subject to the approval of the board. The Code provision required the sheriff, undersheriff, or a deputy to act as jailer, except when, in the discretion of the board, jailers were allowed. These jailers were not deputies. Under the amendment, they are made deputies, and may be employed as such when the exigencies of business require

it. The fact that the sheriff may appoint them is not significant, for the reason that any officer who was entitled under the Code provisions to have a deputy was entitled to make his own selection (Pol. Code, sec. 4603), subject only to the approval of the board under the Act of 1893, as to the maximum limit fixed by the Code provisions.

At the last session of the legislature a law was enacted authorizing the boards of commissioners of the respective counties to allow such additional deputies, in excess of the maximum prescribed by law, as may be required "for the faithful and prompt discharge of the duties of any county office, and to fix the salary of such deputies" within the prescribed maximum. (Sess. Laws, 1907, p. 479.) This fact furnishes some evidence of the general intention of the legislature in dealing with the subject under consideration to prescribe a rule applicable to all county officers alike.

The judgment of the district court is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

PICKET PUBLISHING CO., RESPONDENT, v. BOARD OF
COUNTY COMMISSIONERS OF CARBON COUNTY,
APPELLANT.

(No. 2,445.)

(Submitted November 5, 1907. Decided November 18, 1907.)

[92 Pac. 524.]

*Injunction—County Printing—Contracts—Board of County
Commissioners—Powers—Public Policy.*

*Injunction—Board of County Commissioners—Printing Contracts—
Validity.*

1. *Held*, on an appeal from an order refusing to dissolve an injunction, that, under Political Code, sections 4230 (subd. 20) and 4233, a contract made by a board of county commissioners, a few weeks before the expiration of its term of office and upon the ex-

piration of a prior contract, for county printing for the two succeeding years, was valid, in the absence of fraud in its making, and binding upon the incoming board.

Same—Public Policy.

2. Nor was the contract, above referred to, void as against public policy.

Same—Contracts—Public Policy—How to be Determined.

3. Courts may not arbitrarily declare an act or contract void as against public policy; but the question of its invalidity in this respect must be determined by them in view of legislative declarations, or, in their absence, by reference to judicial decisions.

Boards of County Commissioners—Powers—Abuse.

4. The mere fact that the power conferred, by sections 4230 and 4233 of the Political Code, upon boards of county commissioners to let contracts for county printing for a term of two years, may be abused, is not of itself a sufficient reason for holding that such power does not exist or ought not to be exercised.

Appeal from District Court, Carbon County; C. H. Loud, Judge.

ACTION by the Picket Publishing Company against the board of county commissioners of Carbon county to restrain the violation of a printing contract. From a judgment for plaintiff, and from an order refusing to dissolve an injunction, defendant appeals. Affirmed.

Mr. Albert J. Galen, Attorney General, and Mr. E. M. Hall, Assistant Attorney General, for Appellant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In December, 1904, the board of county commissioners of Carbon county entered into a contract for the county printing for a term of two years. Upon the expiration of that contract, in December, 1906, the same board entered into a contract with the Picket Publishing Company, plaintiff and respondent herein, by the terms of which that company agreed to do the public printing for Carbon county for two years from December 11, 1906, at a certain specified rate, payments to be made quarterly. The personnel of the board of county commissioners was entirely changed by the election in November,

1906, the new board coming into existence in January, 1907. On January 22, 1907, the new board, without the knowledge or consent of the Picket Publishing Company, made and entered upon its minutes an order which assumed to abrogate and set aside the contract of December, 1906, made by the old board. This action was thereupon commenced by the Picket Publishing Company to restrain the new board from violating that contract. A temporary injunction was issued. The defendant interposed a demurrer to the amended complaint and filed a motion to dissolve the injunction. The demurrer and motion were overruled. The defendant declined to plead further, its default was entered, and, upon a hearing had, a judgment was rendered and entered in favor of the plaintiff, which made perpetual the injunction and awarded plaintiff its costs. From the order refusing to dissolve the injunction and from the final judgment, the defendant appeals.

It is contended on behalf of the appellant that a contract of this character entered into by the outgoing board, which contract extends beyond the term of such board and tends to bind the incoming board, is void, and numerous cases are cited in support of that contention. (*Bank v. Peck*, 43 Kan. 643, 23 Pac. 1077; *Shelden v. Butler County*, 48 Kan. 356, 29 Pac. 759, 16 L. R. A. 257; *Coffee County v. Smith*, 50 Kan. 350, 32 Pac. 30; *Milliken v. Edgar County*, 142 Ill. 528, 32 N. E. 493, 18 L. R. A. 447; *Board of Commissioners of Jay County v. Taylor*, 123 Ind. 148, 23 N. E. 752, 7 L. R. A. 160; *Morrison v. Board*, 16 Ind. App. 317, 44 N. E. 65; *Vacheron v. New York City*, 34 Misc. Rep. 420, 69 N. Y. Supp. 608; *Hudson County v. Layton*, 28 N. J. L. 244; *Franklin County v. Ranck*, 9 Ohio C. C. 301; *State v. Platner*, 43 Iowa, 140.)

The case of *Bank v. Peck* arose out of an attempt on the part of the First National Bank of Medicine Lodge to compel the board of county commissioners to deposit the public moneys of that county in such bank, and set up a contract made with the old board for a term of three years. Under the Kansas statutes public moneys are required to be deposited in some bank

or banks and interest collected on the average daily balances, but the matter of choosing the particular depository or depositories, and the character of security to be required, are left to the discretion of the several boards. The court held that, since the credit of the designated depository might become impaired or the security furnished valueless, it would be manifestly injurious to the public welfare and against public policy to permit a board of county commissioners to bind the county to deposit in a particular bank for a long period of time.

Shelden v. Butler County arose out of the attempted breach of a printing contract. The court held that, since there is not any limit fixed by law upon the time during which a printing contract may run, therefore, if the old board could contract for more than one year, it could likewise for a long term of years—almost an indefinite time. In view of this, and since under the statutes of Kansas the board is required to reorganize once a year, the powers of the board must be held to be limited, in matters of this character, to the making of a contract which does not extend beyond one year.

Coffee County v. Smith was decided by the same court, and the same result reached upon the same principles.

Millikin v. Edgar County was a controversy between the keeper of the county poor and the board of supervisors. The old board entered into a contract with Milliken to act as keeper for three years. The new board annulled that contract, and this action resulted. The court held that, as there was not any limit expressly imposed by law upon the time during which such a contract might run, therefore, if it could be made to run for a term beyond that of the board making it, it might likewise be made to run for many years; but the court, construing the statute of Illinois authorizing the employment of such keeper with other provisions of the laws of that state—which are not set out in the opinion—reached the conclusion that the legislative intent was to limit the term of such employment by any board to one year.

In the case of *Board of Jay County v. Taylor* the court particularly characterizes the contract under consideration in that case as one which was not for the public welfare, and, since it provided for the employment of a legal adviser to the board, the old board ought not to be permitted by such a contract to impose upon the new board an attorney in whom the new board might not have any confidence. The court held that the contract was void as against public policy.

Morrison v. Board arose out of the attempt by a county auditor, after his successor had been elected and eighteen months before the next election, to bind his county by a contract which he made with a printing-house to furnish the necessary election blanks, books, etc., for such election. The court held that the outgoing auditor had not the power to make the contract, and, on rehearing, said that, if such a contract could be made, it would be void as against public policy.

The contract which gave rise to the case of *Vacheron v. New York City* was made in 1891 to run for a period of ten years, and provided for the employment of Vacheron to do certain road work for that time. The court held that since the Act of the legislature providing for the charter of Greater New York prescribed that such charter should become effective on the first day of January, 1898, the contract with Vacheron expired on that date, since under the charter the board of supervisors did not have control of that particular character of work.

In *Hudson County v. Layton* and *State v. Platner* it was held in each instance that the contract in question operated in violation of a statute of the respective states.

In *Franklin County v. Ranck* the Ohio circuit court held that the contract by the outgoing board with a person to act as janitor of the courthouse for the next ensuing year was not binding upon the incoming board, and concluded that such contract is "not only evidence of unseemly conduct on the part of the members of the board, but in its object, operation, and tendency, is calculated to be prejudicial to the public interests and is against public policy, and void."

In our opinion, every case cited above is clearly distinguishable in the facts from the one now before us. Those cases divide themselves into two classes: (a) Those in which it is held that the board or officer did not have the power to make the contract under consideration; and (b) those holding that such contracts are void as against public policy.

Our Political Code (section 4230, subdivision 20) particularly authorizes the board of county commissioners to enter into a contract for public printing. It provides: "The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law: * * * 20. To contract for the county printing, and provide books and stationery for county officers." And with equal particularity the same Code, in section 4233, limits the term of such a contract to two years, in this language: "* * * No such contract for printing shall extend for more than two years."

First, then, it becomes a question of the power of the outgoing board of Carbon county to make a contract for public printing for a term not exceeding the limit fixed by statute. That the board has the power to make a contract for public printing is not open to question. The Code above specifically grants the power, and there is not any limitation or restriction imposed by law upon that power, save only that it shall be for printing for which the county may be chargeable, and the further limitations as to prices to be paid and the term for which such contract shall run as stated above. The power to make the contract is specifically granted; but the time when such power shall be exercised is not limited or prescribed. Therefore we say that the proposition is incontrovertible that it may be exercised at any time during the term of the board, when a prior contract for such work has expired or is about to expire, and, so far as the power of the board is concerned, it is just as ample and complete the last week of the board's official existence as at any time prior thereto. The making of such a contract at a time near the close of the official career of an outgoing board may, in some instances, savor of bad faith or even

of fraud; but there is not any charge of bad faith or fraud in this instance. The board having the power to make a printing contract at any time during its term, when such a contract is to be let, and the Code having expressly authorized such a contract to be made for a term not exceeding two years, and the contract under consideration being of that character, it was valid and binding upon the new board as upon the old one (*Board of Commissioners of Jay County v. Taylor*, above), in the absence of fraud in its making, unless the contract is void as against public policy.

Second: Can it be said that this contract falls within the second class of cases above, and is void as against public policy? In determining whether any matter is against public policy, we are not left without any criterion by which to be guided in this state; and neither can this court arbitrarily declare an act or contract under that ban. The public policy of this state is to be determined from legislative declarations, or, in the absence of any such declarations, from judicial decisions. In *MacGinniss v. Boston & Montana Con. C. & S. Min. Co.*, 29 Mont. 428, 75 Pac. 89, this court said: "The public policy of the state varies from time to time. It is not to be measured by the private convictions or notions of the persons who happen to be exercising judicial functions, but by reference to the enactments of the law-making power, and, in the absence of them, to the decisions of the courts." There is not anything in the decisions of this court which militates against the validity of a contract of this character.

Our Code, in considering the subject of contracts, declares: "That is not lawful which is: (1) Contrary to an express provision of law; (2) Contrary to the policy of express law, though not expressly prohibited; or, (3) otherwise contrary to good morals." (Civ. Code, sec. 2240.)

This contract is not one which is contrary to any express provision of law; and neither can it be classed as one contrary to good morals. It is not a contract which can be said to be against the policy of express law, for, as indicated above, the legisla-

ture particularly clothed the board with power to make such contract, and, while it could have limited the duration of such contract to the term of the board making it, it did not do so, but fixed the limit of its duration at two years. When the legislature by express provision of law thus fixed the limit of duration of such a contract, such legislative declaration excludes the idea that a contract drawn according to the mandate of the law, and for a term not exceeding the limit so prescribed, can be against the policy of the law.

It is no argument to say that the power thus given to these several boards may sometimes be abused. The mere fact that such authority may be, or in fact is, abused in any given instance, is not itself a reason for holding that such power does not exist or ought not to be exercised.

In support of our conclusion, we cite *Board of Commissioners v. Shields*, 130 Ind. 6, 29 N. E. 385; *Reubelt v. School Town of Noblesville*, 106 Ind. 478, 7 N. E. 206; *Webb v. Spokane County*, 9 Wash. 103, 37 Pac. 282; *Liggett v. Board of Commissioners*, 6 Colo. App. 269, 40 Pac. 475.

We have not considered the question of the appropriate remedy in a case of this kind, since in this particular instance that question is purely academic.

We think the judgment and order of the district court should be affirmed; and it is so ordered.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

KENNEDY, ADMINISTRATRIX, RESPONDENT, v. DICKIE, APPELLANT.

(No. 2,405.)

(Submitted November 4, 1907. Decided November 18, 1907.)

[92 Pac. 528.]

Equity Cases—Appeal—Disposition of Cause—District Courts—New Trial.

1. The supreme court must, under Act of 1903 (Laws 1903, 2d Extra. Session, p. 7), on appeal in equity cases review all questions of fact arising upon the evidence presented, and determine the same, unless for good cause shown a new trial or the taking of further evidence be ordered. In a cause of an equitable nature it was held on appeal that the defendant had not made out a case upon which he was entitled to recover, and that therefore the trial court should have found in plaintiff's favor. The cause was remanded "to be proceeded with in accordance with the suggestions" made in the opinion. *Held*, that the district court thereafter properly entered judgment for plaintiff, a new trial or the taking of further evidence not having been ordered.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

ACTION by Catherine Kennedy, administratrix of the estate of Edward B. Kennedy, deceased, against William Dickie. Judgment for plaintiff, and defendant appeals. Affirmed.

Mr. C. L. Harris, for Appellant.

The effect of the order "judgment reversed and cause remanded" is only to set aside the judgment that a new trial may be held, unless it appears from the opinion of the court that the adjudication was intended to be a final disposition of the cause. (*Ryan v. Tomlinson*, 39 Cal. 639.) The appellate court will not determine the weight of evidence to see what the facts are and order final judgment accordingly. Especially is this true where the evidence is insufficient to sustain the findings or judgment. (*Barkley v. Tieleke*, 2 Mont. 435;

Chumasero v. Vial, 3 Mont. 376; *Barden v. Montana Club*, 10 Mont. 330, 24 Am. St. Rep. 27, 11 L. R. A. 593, 25 Pac. 1042; *Sherman v. Nason*, 25 Mont. 283, 64 Pac. 768; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; Hayne on New Trial and Appeal, sec. 296.)

A reversal of a judgment has no other effect than to set aside and vacate it, leaving the parties standing as they stood before trial. (*Stearns v. Aguirre*, 7 Cal. 443, 449; *Sharp v. Miller*, 66 Cal. 98, 4 Pac. 1065; *Argenti v. City of San Francisco*, 30 Cal. 459; *Ryan v. Tomlinson*, 39 Cal. 639; *Chandler v. People's Savings Bank*, 61 Cal. 403.)

The supreme court, in its former opinion, simply determined the "law of the case" upon the state of facts before it, and did not intend or direct the lower court to enter judgment for plaintiff. (*Nolan v. Montana Cent. Ry. Co.*, 25 Mont. 107, 63 Pac. 926; *Sherman v. Nason*, 25 Mont. 283, 64 Pac. 768; *Hurley v. O'Neill*, 26 Mont. 269, 67 Pac. 626; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Mitchell v. Davis*, 23 Cal. 382.)

Mr. Fred. H. Hathhorn, and *Mr. Harry A. Groves*, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

This is an appeal from a judgment of the district court of Yellowstone county. The case has been here before. (*Kennedy v. Dickie*, 34 Mont. 205, 85 Pac. 982.) Upon the trial in the district court, prior to the first appeal, the case resolved itself into one of an equitable nature by reason of the equitable defense pleaded in the defendant's answer. On the first trial defendant had a judgment in his favor. That judgment was reversed by this court, and the cause remanded to the district court. The case being again called in the court below, the plaintiff requested the court to make findings of fact in her favor. Before the consideration of that motion, the defendant applied in open court for leave to amend his answer, and stated to the court that he desired a retrial of the action. The proposed

amended answer was not submitted to the court below, and is not before us for consideration. The district court, however, immediately made a finding of fact, as follows: "All of the issues of fact involved in the above-entitled action are hereby determined for and in favor of the above-named plaintiff." The court concluded as matter of law that the plaintiff was entitled to restitution of the lands and premises described in her complaint, and entered a judgment in her favor. From that judgment the defendant has appealed to this court.

The appellant contends that he was entitled to a new trial in the district court, and that the court erred in entering judgment in favor of plaintiff without retrial. Controversy has arisen between the parties as to the effect of the mandate of this court contained in the former decision. The writer of this opinion was not a member of the court at the time that decision was rendered, and is, therefore, in the same situation regarding the case as the judge of the district court was when the *re-mittitur* was presented to him. The question for decision by him was: What was his duty in the premises in view of the direction of this court? In remanding the case the supreme court said: "The district court, we think, was in error in deciding the case as it did. At the close of defendant's evidence, the plaintiff requested the court to find in her favor. This it should have done since the defendant did not make out a case upon which he was entitled to recover. The judgment and order are therefore reversed, and the cause is remanded to be proceeded with in accordance with the suggestions herein."

The original appeal in the case was submitted on April 21, 1906, and decided May 14, 1906. At the second extraordinary session of the eighth legislative assembly a law was passed, effective December 10, 1903, relating to the powers and duties of the supreme court on appeals. Section 1 of that Act reads as follows: "The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. * * * In equity cases, and in mat-

ters and proceedings of an equitable nature, the supreme court shall review all questions of fact arising upon the evidence presented in the record, whether the same be presented by specifications of particulars in which the evidence is alleged to be insufficient or not, and determine the same, as well as questions of law, unless, for good cause, a new trial or the taking of further evidence in the court below be ordered." (Laws 1903, 2d Extra. Sess., p. 7.)

In this case this court did not order a new trial or the taking of further evidence. On the contrary, the court said that the district court erred in deciding the case in favor of the defendant; that it should have decided in favor of the plaintiff, since the defendant did not make out a case upon which he was entitled to recover. The duty of the district court in the premises was plain. No new trial having been ordered, there was but one thing to be done, to-wit, enter a judgment in favor of the plaintiff. This the court did.

The appellant complains of the hardship that will ensue in cases like this, where a judgment may be rendered in the district court in favor of the wrong party, because, he says, that in such case the party against whom a judgment is directed to be entered by this court will never have opportunity to present here any errors that may have been committed against him in the court below, for the reason that, under our practice, only those errors relied on by the appellant are incorporated in the record. The complaint has some merit in fact, as the writer of this knows from personal professional experience. However, the tenth legislative assembly in its wisdom remedied the practice in this regard by providing that the prevailing party in the court below may have his exceptions incorporated in any bill of exceptions or statement of the case, and "whenever the record on appeal shall contain a bill of exceptions or statement of the case properly settled, setting forth any order, ruling or proceeding of the trial court against the respondent affecting his substantial rights on the appeal of said cause, together with the objection and exception of such respondent properly made, and re-

served, settled and allowed in such bill of exceptions, or statement, the supreme court on such appeal shall consider such orders, rulings, or proceedings, and the objections and exceptions thereto, and shall reverse or affirm the cause on said appeal according to the substantial rights of the respective parties, as shown upon the record." (Laws 1907, Chapter 35, p. 66.)

The judgment of the district court of Yellowstone county is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY: I concur in the result reached and in the construction given to the Act of the extraordinary session of 1903. It is immaterial now what the intention of this court or the individual members may have been in remanding this case upon the former appeal. The district court carried out the plain meaning of the Act of 1903, and cannot be put in error in so doing.

Rehearing denied December 11, 1907.

**MASSACHUSETTS SHEEP CO., RESPONDENT, v. HUMBLE,
APPELLANT.**

(No. 2,448.)

(Submitted November 6, 1907. Decided November 18, 1907.)

[92 Pac. 527.]

Conversion—Sheep—Chattel Mortgages—Description—Identification—Evidence—Exclusion—Correct Ruling—Wrong Reason.

Conversion—Sheep—Chattel Mortgages—Description—Identification—Evidence.

1. The description of a band of sheep, in a mortgage, was "1,000 head of sheep on the range on Medicine Lodge creek, in Fremont county, Idaho, together with the wool and increase." The sheep were thereafter purchased from the mortgagor and incorporated in the buyer's band. The mortgagee thereafter, under foreclosure proceedings had the sheep, alleged to have been mortgaged, seized and sold. In an action in conversion the defendant offered the above mortgage in evidence, together with the proceedings had by the sheriff. This evidence was excluded. *Held*, that in excluding the evidence the court acted properly, the description in the mortgage being wholly insufficient to identify the subject thereof, and that, therefore, no additional evidence in this respect having been offered, defendant had failed to connect himself with the mortgagor's title, and in seizing them, occupied the position of a naked trespasser.

Same—Evidence—Exclusion—Correct Ruling—Wrong Reason.

2. Where the ruling of the district court in the exclusion of evidence in an action in conversion was correct, the fact that it stated a wrong reason therefor was immaterial.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION by the Massachusetts Sheep Company against J. A. Humble. From a judgment for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

Messrs. Marshall & Stiff, for Appellant.

Mr. John M. Evans, and *Mr. Elmer E. Hershey*, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover damages for the wrongful conversion by the defendant of seven hundred and fifty-one head of sheep, consisting of ewes and lambs, alleged to belong to plaintiff and to be of the value of \$3,113. As a part of this cause of action it is alleged, further, that the ewes and lambs so taken were at the time of the conversion ranging with other ewes and lambs belonging to plaintiff in Fremont county, Idaho; that the defendant drove all of them from their accustomed range and held them for two days without food and care; that in separating those taken from the herd the defendant took many ewes, leaving their lambs, which thereafter died; that he also took many lambs, leaving their dams behind, which thereafter, having been returned to the range, wandered off in search of their lambs and were lost. It is alleged that plaintiff was damaged in this behalf to the amount of \$1,000.

The answer puts in issue the title of the plaintiff, and then proceeds to justify the taking by alleging, in substance, that on December 19, 1903, the sheep in controversy belonged to one S. J. Tillman; that on that date, having become indebted to defendant in the sum of \$1,500 by promissory note, the said Tillman delivered to defendant his chattel mortgage, executed according to the law of the state of Idaho, by which he hypothecated one thousand head of sheep, including the ewes described in the complaint, with their natural increase, running on the range in Fremont county, Idaho, to secure the payment of said note and interest; that the lambs mentioned in the complaint were the natural increase of these ewes; that the mortgage was duly recorded in Fremont county, Idaho, wherein said sheep then were and thereafter remained; that thereafter, on March 16, 1905, the said note, principal and interest, being due and unpaid, the defendant caused the sheriff of Fremont county, Idaho, to foreclose the mortgage for the satisfaction thereof; and that this officer having, on March 16, 1905, seized the said ewes and their lambs, thereafter, on March 25, 1905, sold them

at public sale, in conformity with the laws of the state of Idaho in such cases made and provided, to satisfy the amount of the note, and not otherwise, and applied the proceeds to that purpose.

By agreement of the parties the affirmative allegations of the answer were deemed denied. The trial resulted in a verdict and judgment for plaintiff. The defendant has appealed from the judgment and an order denying him a new trial.

From the evidence introduced by the plaintiff it appears that S. J. Tillman, claiming to be the owner of fifteen hundred head of sheep in charge of a herder on the range in Fremont county, Idaho, sold them to plaintiff for a consideration fixed at \$5,000. Payment was to be made in the stock of plaintiff company. When the stock was issued to Tillman, which was done on December 18, 1903, he was made the manager of the plaintiff. As it turned out afterward, Tillman only had a one-fourth interest in a herd of sheep in Fremont county, Idaho, owned jointly by him and one Sedman. After the sale to plaintiff the Tillman-Sedman partnership was dissolved and a division made of the herd. Tillman's share amounted to three hundred and ninety-six ewes and eighteen lambs. At that time the plaintiff had a herd of about two thousand running on the same range. The Tillman sheep were turned over to the plaintiff's herder, and the whole herd branded or marked with paint. The sale was made on November 23, 1903. Tillman's sheep were incorporated in the company herd between the 1st and 10th of December. This was done by Tillman immediately upon dissolution of the Tillman-Sedman partnership, and the herder who had been in charge of the partnership herd was put in charge of plaintiff's herd.

The plaintiff having closed its case, the defendant offered in evidence the chattel mortgage and note referred to in the answer, together with the record of the proceedings of the sheriff of Fremont county, Idaho, made in conformity with the statutes of that state. Copies of the laws of Idaho, touching fraudulent transfers, and those prescribing the procedure to be pur-

sued by the sheriff in the foreclosure of chattel mortgages, were also offered. The purpose of this evidence was to support defendant's contention that, though the sale was made by Tillman to the plaintiff, yet it had not been accompanied by an immediate delivery, followed by an actual and continued change of possession, and was therefore fraudulent and void as to the defendant, who had in good faith become Tillman's creditor and an encumbrancer of the subject of the sale while Tillman was still ostensibly in possession of it. To the introduction of this evidence the plaintiff objected that it was immaterial and irrelevant; the description in the mortgage itself not being sufficient to identify the property hypothecated by it. The description in the mortgage is as follows: "One thousand head of sheep on the range on Medicine Lodge creek, in Fremont County, Idaho, together with the wool and increase." No additional evidence having been offered for this purpose, the objection was sustained. The court ruled, further, that it was immaterial, because plaintiff's evidence, since defendant admitted its truth, justified the legal conclusion that the delivery made by Tillman to the company, and the change of possession following it, were a sufficient compliance with the statute. Thereafter the hearing of evidence was confined to the question of damages. Defendant's exception to this ruling of the court presents the only question submitted for decision.

Counsel for defendant cite in their brief and discuss many of the decisions of this and other courts construing and applying statutes relating to fraudulent transfers of personal property, pointing out the fact that the statute of Idaho (Rev. Stats. 1887, sec. 3021) is substantially the same as our statute on the same subject (Civ. Code, sec. 4491). They insist that the evidence was competent and material, and that the question whether the requirements of the statute had been met by plaintiff and Tillman in consummating the sale should have been submitted to the jury under suitable instructions. It may be conceded, however, that the court was wrong in drawing the inference it did from the uncontroverted evidence of the plaintiff, yet, in

the absence of some evidence tending to show that the sheep he caused the sheriff to seize and sell under the mortgage were the same as those which Tillman hypothecated to defendant, the defendant failed to connect himself in any way with Tillman's title, and stood, therefore, in the attitude of a naked trespasser. The description contained in the mortgage was clearly insufficient to identify the subject thereof as including the property described in the complaint. It appears clearly from the evidence that plaintiff's herder was in possession of the sheep sold to the company. In order for the defendant to justify the taking of them by the sheriff by his authority, it became incumbent upon him to show that the sheep hypothecated to him by Tillman were the same sheep as those taken by the sheriff. Having failed in this respect to justify the taking, he was without defense on this issue, and the ruling of the court was correct, although it may have, among other reasons, stated a wrong one to justify the ruling.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

EASTERLY, APPELLANT, v. JACKSON, RESPONDENT.

(No. 2,443.)

(Submitted November 4, 1907. Decided November 18, 1907.)

[92 Pac. 480.]

Nonsuit—Retrial—Law of the Case—Contracts—Consideration.

1. Where, on the retrial of a cause, the judgment in which had been reversed on a former appeal, for the reason that the instrument declared upon and on which recovery was had was without consideration, no new or additional evidence on the subject of consideration had been adduced, nonsuit was proper. The former decision constituted the law of the case.

36	205
41	489

Appeal from District Court, Broadwater County; W. R. C. Stewart, Judge.

ACTION by Allen M. Easterly against James E. Jackson. From an order denying plaintiff a new trial after the entry of judgment in favor of defendant, plaintiff appeals. Affirmed.

Mr. E. H. Goodman, and Mr. John H. Shoher, for Appellant.

MR. JUSTICE SMITH delivered the opinion of the court.

This is the second appeal in this case. (*Easterly v. Jackson*, 29 Mont. 496, 75 Pac. 357.) On the former appeal this court held that the instrument sued on was, according to plaintiff's own testimony, given without consideration, and reversed a judgment in favor of the plaintiff. Upon a new trial being had, the court below granted a nonsuit against the plaintiff, and thereafter entered a judgment in favor of the defendant. From an order denying him a new trial of the issues, plaintiff appeals.

Personally, I am unable to concur in the reasoning of this court upon the former appeal. But that decision is the law of the case, and, unless the plaintiff on the retrial introduced some additional evidence going to show a consideration for the instrument declared upon, he was properly nonsuited. I have carefully examined the testimony, and I find no new or additional evidence in substance. Had the offer of proof, made by plaintiff's counsel, been as broad in its scope as the allegations of his replication, I have no doubt it would have been error on the part of the court to refuse to allow the testimony to be taken; but that offer of plaintiff falls far short of comprehending the material allegations of the replication, and, had the proof been received, it would have added nothing to the case made by plaintiff upon the first trial.

The order of the district court of Broadwater county is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY: In my opinion the decision on the former appeal was correct, and I therefore concur in the conclusion that the order must be affirmed.

MR. JUSTICE HOLLOWAY, being disqualified, takes no part in the foregoing decision.

LEWIS, RESPONDENT, v. NORTHERN PACIFIC RY. CO.
ET AL., APPELLANTS.

(No. 2,454.)

(Submitted November 8, 1907. Decided November 23, 1907.)

[92 Pac. 469.]

36	207
137	89
38	248
38	368

36	207
39	24

38	207
41	293

Corporations—Railways—Constitution—Statutory Construction—Master and Servant—Personal Injuries—New Trial—Excessive Damages.

Corporations—Charters—Power of Legislature to Amend.

1. While corporations are persons, they are not such for all purposes. They have no inalienable rights. Being creatures of the statute, the legislature may, under the Constitution (Art. XV, secs. 2, 3), enact any legislation by way of amendment of the law creating them, which does not violate the rule that property acquired under the operation of their charters cannot be taken away, and that contracts made in like manner may not be impaired.

Same—Railways—Liability to Employees—Statutes—Constitution—Equal Protection of Laws.

2. *Held*, that the enactment of Chapter 83 of Laws of 1903, page 156, relative to the liability of railway corporations for damages sustained by an employee by reason of the negligence of certain of his therein enumerated coemployees, is a valid exercise of legislative power, under Article XV, sections 2 and 3 of the Constitution, reserving to the state the right to alter or amend corporate charters theretofore granted; and that, therefore, the Act is not open to the objection that it deprives railway corporations of the equal protection of the laws, guaranteed to all under the Fourteenth Amendment to the United States Constitution, by subjecting them to liabilities not imposed upon natural persons or other corporations engaged in the same pursuit.

Same—Power of Legislature to Destroy.

3. *Obiter*: Under the right reserved to the state by sections 2 and 3, Article XV of the Constitution, the legislature may not only alter

corporate charters, but, if deemed expedient, destroy the corporate body.

Same—Statutory Construction—Constitution—Equal Protection of Laws.

4. The general purpose of the Act above being to protect railroad employees in their particularly hazardous employment, it might be held not to violate the equal protection of the law clause of the United States Constitution, under the rule of statutory construction that, where the general purpose of a statute has been ascertained, general words may be restricted to a particular meaning, or those of a restricted meaning expanded so as to embrace the general purpose and effectuate it,—by holding, that the expression “railway corporation,” therein found, includes all persons, both individual and corporate, engaged in operating railways.

Foreign Corporations—Privileges.

5. Foreign corporations doing business in the state are not entitled to any greater rights than are enjoyed by domestic corporations engaged in the same kind of business. (Const., Art. XV, sec. 11.)

Personal Injuries—Excessive Damages—Jury—Abuse of Discretion.

6. In personal injury cases, the amount to be awarded is left to the fair discretion of the jury, under the facts of the particular case, and damages so awarded, even if comparatively large, will not be held determinative of an abuse of such discretion, unless so disproportionate to the injury complained of as to shock the moral sense.

Same—Excessive Damages—When not Ground for New Trial.

7. Where an amount awarded by the jury for personal injuries, claimed by defendant to have been so excessive as to amount to an abuse of the discretion lodged in it, may have been the result of a miscalculation, or based upon a wrong standard, the award cannot be said to have been the result of passion or prejudice so as to entitle the defendant to a new trial under subsection 5 of section 1171 of the Code of Civil Procedure.

Same—Excessive Damages—New Trial—Remission of Excess—District Courts.

8. *Held*, that the district court, in an action for damages for personal injuries alleged to have been suffered by plaintiff, a brakeman on a railroad, through the loss of his left hand, was justified in granting a new trial conditioned upon the remission of \$7,400 from a verdict for \$17,400, and in thereafter, with plaintiff's consent, scaling it to \$10,000, and that such latter amount was not excessive in view of all the circumstances in the case.

Same—Damages—Elements—Impairment of Earning Capacity.

9. In arriving at a verdict in a personal injury case, the jury, in addition to the mental and physical pain suffered by plaintiff, and the disfigurement of his person, should also take into consideration, where earning capacity depends upon bodily strength, the fact that his physical condition becomes impaired by advancing age; and that, as a consequence, his earning capacity is diminished thereby.

Appeal from District Court, Broadwater County; Frank Henry, Judge.

ACTION by S. L. Lewis against the Northern Pacific Railway Company and one of its locomotive engineers for damages for

personal injuries. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Messrs. Wallace & Donnelly, for Appellants.

Section 1 of Chapter 83 of the Laws of 1903 violates the Fourteenth Amendment of the Constitution of the United States, in that it denies to railway corporations the equal protection of the laws. The extra hazard to which railway employees are exposed in the operation of trains is a reason for the enactment of statutes imposing upon those who operate them liability to one employee for injuries due to the negligence of a fellow-employee. But to be valid such statutes must impose this liability upon all who do or who may operate them, individuals, associations and corporations alike. And the legislature of this state appears to have recognized this, for, by the fellow-servant Act of 1905 (Laws 1905, Chap. I), "every person or corporation operating a railway or railroad in this state" is made liable for injuries sustained by one employee through the negligence of another. (See *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666.)

When, as in this case, it plainly appears that the verdict is not a fair and impartial one, the court in reducing it should not leave it large because it was originally large, but should reduce it to a figure approximating what courts generally have held to be the maximum amount that could be recovered for like injuries. (See *Kennon v. Gilmer*, 5 Mont. 273, 51 Am. Rep. 45, 5 Pac. 847; *Rodney v. St. Louis etc. Ry. Co.*, 127 Mo. 676, 28 S. W. 887; *Thompson v. Railway Co.*, 71 Minn. 89, 73 N. W. 707; *Struble v. Railway Co.*, 128 Iowa, 158, 103 N. W. 142; *Brown v. Southern Pac. Ry. Co.*, 7 Utah, 288, 26 Pac. 579; *Campbell v. Wheelihan-Weidauer Co.* (Wash.), 89 Pac. 161; *Stiller v. Bohn Mfg. Co.*, 80 Minn. 1, 82 N. W. 981.)

Messrs. Walsh & Nolan, for Respondent.

Debate on the question of the constitutionality of a statute of the character of the Act of 1903 is foreclosed by the decisions

of the supreme court of the United States. (*Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Minn. & St. Louis Ry. Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109; *Tullis v. Lake Erie & W. R. R. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192.)

Laws of the same general character, imposing burdens upon railroad corporations without, in terms, subjecting individuals engaged in operating railroads to the same liability have been sustained by the court of last resort in *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; *St. Louis & S. F. Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; *Minn. & St. Louis Ry. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; *Minn. & St. Louis Ry. Co. v. Emmons*, 149 U. S. 364, 13 Sup. Ct. 870, 37 L. Ed. 769; *C. R. & P. Ry. Co. v. Zernecke*, 183 U. S. 582, 22 Sup. Ct. 229, 46 L. Ed. 339; *Pittsburgh, C. C. & St. L. Ry. Co. v. Lighthouse (Ind.)*, 78 N. E. 1033; *Schus v. Powers-Simpson Co.*, 85 Minn. 447, 89 N. W. 68, 69 L. R. A. 887; *Union Pacific Ry. Co. v. De Busk*, 12 Colo. 294, 13 Am. St. Rep. 221, 20 Pac. 752, 3 L. R. A. 350.

The basis of these decisions is that the statute does make an individual, should there occur so extraordinary a thing as an individual operating a railroad, liable as well as a corporate being, the intent and purpose of the Act being looked to. The conclusion is enforced by the almost uniform holding that under these statutes making railroad corporations liable, a receiver operating a railroad is likewise answerable (*Wall v. Platt*, 169 Mass. 398, 48 N. E. 270; *Mikkelson v. Truesdale*, 63 Minn. 137, 65 N. W. 260; *Peirce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 280; *Rouse v. Harrey*, 55 Kan. 589, 40 Pac. 1007); as are mortgagees similarly engaged (*Daniels v. Hart*, 118 Mass. 543), and trustees (*Union Trust Co. v. Kendall*, 20 Kan. 515).

Corporations do not come within the purview of the clause of the Fourteenth Amendment, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." (*Orient Ins. Co. v. Daggs*,

172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *Pittsburgh C. C. & St. L. Ry. Co. v. Lighthouse* (Ind.), 78 N. E. 1033-1039.) And the right of the state to lay down terms and conditions upon which a foreign corporation may operate within the state is no longer open to dispute. (*Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; see, also, *St. Louis I. M. & S. Ry. Co. v. Paul*, 173 U. S. 402, 19 Sup. Ct. 412, 43 L. Ed. 746.)

Rulings sustaining verdicts for amounts in excess of the judgment in this case, as it now stands, for the loss or disablement of a hand, will be found at page 369 of 4 Thompson's Commentaries. See, also, the following cases: *Scheu v. Penn. R. R. Co.*, 141 Fed. 495; *St. Louis I. M. & S. Ry. Co. v. Sparks* (Ark.), 99 S. W. 73.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by the plaintiff to recover damages for the loss of his left hand, sustained while in the employ of the defendant company. It is alleged that the injury was occasioned by the negligence of the engineer of defendant's locomotive while drawing a train upon which the plaintiff was employed as a brakeman.

Plaintiff bases his right of recovery upon the provisions of the Act of the legislature of 1903 (Sess. Laws 1903, p. 156), rendering railroad corporations liable for injuries caused by the negligence of engineers. The trial resulted in a verdict and judgment for plaintiff for \$17,400. The defendant moved for a new trial upon the ground, among others, of excessive damages appearing to have been given under the influence of passion or prejudice. The court entered an order granting the motion, unless plaintiff would within ten days remit \$7,400 of the verdict and judgment. This was done. Thereupon the motion was denied. The defendant has appealed from the judgment and order.

The specifications of error made in the brief are two: (1) The court erred in denying the motion of defendant for a directed verdict in its favor; and (2) the court erred in denying the defendant's motion for a new trial.

Under the first specification the contention is made that the Act of the legislature referred to is obnoxious to that clause of the Fourteenth Amendment to the Constitution of the United States which prohibits the states from denying to any person within their respective jurisdictions the equal protection of the laws. The Act is entitled: "An Act to determine the liability of employers in this State for damages to employees." The first section thereof, which declares the rule applicable to railway corporations, provides: "Every railway corporation including electric railway corporations, doing business in this state, shall be liable for all damages sustained by an employee thereof, within this state, without contributing negligence on his part, when such damages is [are] caused by the negligence of any train dispatcher, telegraph operator, superintendent, master mechanic, yardmaster, conductor, engineer, motorman or of any other employee who has superintendence of any stationary or hand signal."

Conceding that it is within the legislative discretion to change the fellow-servant rule of liability as declared under the common law, counsel insist that, since this provision mentions in terms railway corporations only, and does not include natural persons or other corporations engaged in operating railways, the former are subjected to penalties and liabilities which natural persons and other corporations engaged in the same pursuit are not subjected to. Such statutes have frequently been the subject of controversy before the state and federal courts.

A statute of Iowa provided: "Every railroad company shall be liable for all damages sustained by any person, including employees of the company in consequence of any neglect of the agents, or by any mismanagement of the engineer or other employees of the corporation to any person sustaining such damage." In the case of *McAunich v. Mississippi etc. R. R. Co.*,

20 Iowa, 338, the contention was made that this was obnoxious to the clause of the state Constitution requiring uniformity in the operation of general laws, and prohibiting the granting of special privileges or immunities to any citizen or class of citizens, which, upon the same terms, should not equally belong to all citizens. It was also contended that the statute was a special law, and therefore obnoxious to another constitutional provision prohibiting special or local laws. All of these contentions were overruled, the court holding that it applied to all railroad corporations alike, and was, therefore, of uniform operation throughout the state.

In the later case of *Bucklew v. Central Iowa Ry. Co.*, 64 Iowa, 603, 21 N. W. 103, the contention was made that the same or a similar statute was obnoxious to the clause of the federal Constitution now under consideration, for the reasons urged in *McAunich v. Mississippi etc. R. R. Co.*, *supra*; but the contention was held to be without merit, because the Act applied to all corporations or persons engaged in operating railroads. The decision in *McAunich v. Mississippi etc. R. R. Co.*, *supra*, was held to be controlling, for the reasons that the provisions of the Constitution of Iowa, above referred to, were in effect the same as the clause of the Fourteenth Amendment, which is invoked here.

The validity of this law was again brought in question in the case of *Herrick v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413. The plaintiff, in the employ of the defendant in Iowa, was injured by the negligence of the engineer in charge of a train while he was engaged in coupling cars. An action for damages for the injury was instituted in Minnesota, which resulted in a verdict and judgment for the plaintiff. The contention made in that case was the same as in this. The court disposed of it by saying: "If a state, in view of the peculiar nature of the service upon railroads, and the danger incident to it, shall, as a matter of state policy, require these corporations, which are the creatures of its statutes, to assume the risk of injuries to

their servants resulting from the negligence of fellow-servants also in their employ, we think they have a right to do so. Statutes imposing special duties and liabilities upon railroad companies are to be found on the statute books of almost every state, and, if general in their application to all such corporations, they are valid." On a second appeal the same contention was made and decided adversely to the defendant. (32 Minn. 435, 21 N. W. 471.) On error to the supreme court of the United States this judgment was affirmed (*Minneapolis & St. L. Ry. Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109), the court basing its judgment on the case of *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, in which the same contention was made with reference to the statute of Kansas, enacted in 1874, and declaring: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any person sustaining such damage." After disposing of the contention that the Act deprived the defendant of its property without due process of law, the court said of the contention made here: "The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. * * *

And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions." Then, after citing authorities to the effect that corporations are persons within the meaning of the Fourteenth Amendment, the court continues: "But the hazardous character of the business of operating a railway

would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees, as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities."

In *Pittsburgh C. C. & St. L. Ry. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301, 49 N. E. 582, 69 L. R. A. 875, the supreme court of Indiana had before it an Act of the legislature of that state declaring that every railroad or other corporation, except municipal corporations, operating in the state, shall be liable for damages for personal injury suffered by any employee while in its service, the employee injured being in the exercise of due care, "where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch-yard, shop, roundhouse, locomotive engine, or train, upon a railway, or where such injury was caused by the negligence of any person, coemployee or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, coemployee or fellow-servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct." It was contended, as in *McAunich v. Mississippi etc. R. R. Co.* and *Bucklew v. Central Iowa Ry. Co.*, *supra*, that the Act was in violation, not only of the provisions of the state Constitution prohibiting the general assembly from granting "to any citizen, or class of citizens privileges or immunities, which upon the same terms shall not equally belong to all citizens," but also of the clause, *supra*, of the federal Constitution. Both contentions were overruled, the court citing the case of *Bucklew v. Central Iowa Ry. Co.* to the point that the provisions of the state Constitution embody the same principles as the equality

clause of the federal Constitution, and *Minneapolis & St. L. R. Co. v. Herrick* and *Missouri Pacific Ry. Co. v. Mackey*, to the point that such an Act in no wise infringes upon the latter.

Subsequently the court had before it the same statute, in *Pittsburgh, C. C. & St. L. Ry. Co. v. Lighthouse* (Ind.), 78 N. E. 1033. The same contention was again overruled, the court disposing of it with the following comment: "The subject matter of the statute in question here, and its intent and purpose, so far as applicable to railroads, were to protect employees from the peculiar dangers and hazards in railroading [citing authorities]. Under the decisions cited the character of the employers is not a controlling factor. The statute is to be given at least a reasonable interpretation, one that will carry into effect the legislative intent. As we have shown, the basis of the classification of railroads by themselves was the hazardous and dangerous character of the employment of operating railroads, and this does not depend upon whether railroads are operated by corporations or by one or more persons. If the character of the employer within the meaning of the statute is not important—and the nature of the employment is the test to be applied in construing—the expression 'every railroad or other corporation operating within this state,' as applied to railroads, should, under the rule above stated, be enlarged and expanded so as to include any person, company, or corporation engaged in operating a railroad in this state."

This statute was before the supreme court of the United States in *Tullis v. Lake Erie etc. Ry. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192. The same contention was made, among others, as in the *Montgomery* and *Lighthouse Cases*, *supra*. The court accepted the construction announced by the supreme court of Indiana, disposing of the contention of the company by saying, through Chief Justice Fuller: "Considering the statute as applying to railroad corporations only, we think it cannot be regarded as in conflict with the Fourteenth Amendment."

An Act of the territory of Colorado provided: "That every railroad corporation operating its line of road, or any part there-

of, in this state shall be liable for all damages by fire that is set out or caused by operating any such line of road, or any part thereof, and such damages may be recovered by the party damaged by the proper action in any court of competent jurisdiction." In *Union Pac. Ry. Co. v. De Busk*, 12 Colo. 294, 13 Am. St. Rep. 221, 20 Pac. 752, 3 L. R. A. 350, it was contended, among other things, that this provision discriminated in favor of private individuals against railroad corporations, and thus deprived the latter of the equal protection of the laws. The court, after pointing out that the purpose of the Act was not to punish railroad corporations, but to declare upon whom the loss should fall in case damage by fire should ensue by the operation of railroads, held that the expression "railroad corporation" was used in a popular sense, as denoting any person engaged in operating a railroad, and therefore did not discriminate in favor of natural persons, in declaring a liability against railroad corporations only. The term "corporation" was then construed to include natural persons. The court stated that it felt bound to go thus far, because this was the obvious meaning of the legislature, and, further, because it must do so to avoid declaring the Act unconstitutional.

Several states of the Union have enacted laws of the same general character, imposing burdens and liabilities upon railroad corporations, without in terms subjecting natural persons to the same burdens and liabilities, and they have generally been sustained by their respective courts of last resort. (*Kansas Pac. Ry. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630; *Missouri Pac. Ry. Co. v. Mackey*, 33 Kan. 298, 6 Pac. 291; *Attorney General v. Chicago N. W. Ry. Co.*, 35 Wis. 425; *Ditberner v. Chicago N. W. Ry. Co.*, 47 Wis. 138, 2 N. W. 69; *Leep v. St. Louis & I. M. Ry. Co.*, 58 Ark. 407, 41 Am. St. Rep. 109, 25 S. W. 75, 23 L. R. A. 264; *St. Louis I. M. & So. Ry. Co. v. Paul*, 64 Ark. 83, 62 Am. St. Rep. 154, 40 S. W. 705, 37 L. R. A. 504.) Generally, they have been sustained by the supreme court of the United States; that court accepting the construction given to the particular statute by the state court. In addition to the federal

cases already cited, see, also, *Missouri Ry. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; *St. Louis & S. F. Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; *Minneapolis & St. L. Ry. Co. v. Emmons*, 149 U. S. 364, 13 Sup. Ct. 870, 37 L. Ed. 769; *Chicago R. I. & Pac. Ry. Co. v. Zerneck*, 183 U. S. 582, 22 Sup. Ct. 229, 46 L. Ed. 339.

In Iowa, Indiana and Colorado the theory upon which the respective statutes are sustained is that, though they are in terms applicable to railway corporations only, the general purpose of them is to protect the employees subject to the hazards of the particular employment, and that they are broad enough, when interpreted in the light of this general purpose, to include and bring within their reach natural persons, or associations of them other than corporations, when they engage in the same business. Hence, the classification is not made upon a discrimination between persons of the same class, but between different classes of business. The same conclusion is stated in *Schus v. Powers-Simpson Co.*, 85 Minn. 447, 89 N. W. 68, 69 L. R. A. 887.

In *Herrick v. Minneapolis & St. L. Ry. Co.*, *supra*, however, the decision is based upon the theory that the corporation is a creature of the statute; hence, that the legislature, as a matter of state policy, may impose upon it such additional liabilities and burdens as it chooses.

Our own statute is susceptible of the construction given to the statute of Iowa, Indiana and Colorado, by the courts of those states. The general purpose of it is, as indicated by its title and the character of the provisions embodied in it, to secure the safety of employees, and thus, indirectly, of the public. Assuming that the expression "railway corporation" is used in a general sense, the design being to include all persons engaged in operating railways, it would be free from all objection. And this might be done under the rule of construction that, having ascertained the general purpose of a statute, to give effect to this general purpose, general words may be restricted to a par-

ticular meaning, or those of a restricted meaning may be expanded so as to embrace the general purpose and effectuate it. (2 Lewis' Sutherland on Statutory Construction, 247.) And we might well adopt this construction and rest the validity of the statute upon it. This conclusion, of course, implies that, if the terms of the first section of the statute are such that it must upon any reasonable construction be held to apply to railway corporations exclusively, it would be open to the constitutional objection, because it would make an unfair discrimination against railroad corporations. Perhaps, under the principles declared in the Dartmouth College Case (*Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 578, 4 L. Ed. 629), complaint could be made that such a discrimination would deprive a corporation of the equal protection of the laws, and thus would impair the obligation of their contract with the state. But most of the states, after that decision, followed the suggestion made by Mr. Justice Story, and either in their grant of charters to corporations under special or general laws, or in their Constitutions, reserved the power to alter, amend, or repeal such charters or the general laws on the subject. Our Constitution makes this reservation in unmistakable terms:

"Sec. 2. No charter of incorporations shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are or may be under the control of the state; but the legislative assembly shall provide by general law for the organization of corporations hereafter to be created; *Provided*, that any such laws shall be subject to future repeal or alterations by the legislative assembly." (Const., Art. XV.)

"Sec. 3. The legislative assembly shall have the power to alter, revoke or annul any charter of incorporation existing at the time of the adoption of this Constitution, or which may be hereafter incorporated, whenever in its opinion it may be injurious to the citizens of the state." (Const., Art. XV.)

This reservation is of a substantive right (*Attorney General v. Railway Cos.*, 35 Wis. 425), and means that, if the legislature

deems it expedient, it has the power of destruction of the corporate body. In *Spring Valley Water Co. v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173, the supreme court of the United States, speaking through Chief Justice Waite, said: "The Spring Valley Company is an artificial being created by or under the authority of the legislature of California. The people of the state, when they first established their government, provided in express terms that corporations, other than for municipal purposes, should not be formed except under general laws, subject at all times to alteration or repeal. * * * In California the Constitution put this reservation into every charter, and consequently this company was from the moment of its creation subject to the legislative power of alteration, and, if deemed expedient, of absolute extinguishment as a corporate body." This was said of an Act of the legislature which took away from corporations, organized under a general statute to supply cities and towns with water, the power to fix their rate charge, and lodged it in the municipal authorities. This would seem to be taking away from these bodies the liberty of contract on equal footing with other persons; but the legislation was held to violate "no provision of the Constitution of the United States."

A statute of the state of Arkansas declared that "whenever any railroad company or any company, corporation or person engaged in the business of operating or constructing any railroad or railroad bridge, or any contractor or subcontractor, engaged in the construction of any such road or bridge, shall discharge, with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee, then earned at the contract rate, without abatement or deduction, shall be, and become due and payable on the day of such discharge, or refusal to longer employ; and if the same be not paid on such day, then, as a penalty for such nonpayment, the wages of such servant or employee shall continue at the same rate until paid. *Provided*, such wages shall not continue more than sixty days, unless an action therefor shall

be commenced within that time." The law having been invoked by an employee who had been discharged by a railroad corporation, which refused to pay wages then due, it was held to be a valid exercise of legislative power, so far as it applied to corporations, under a reservation of the state Constitution identical with that of our own, and amounted to an amendment of the charter of the corporation. (*Leep v. St. Louis etc. Ry. Co.*, 58 Ark. 407, 41 Am. St. Rep. 109, 25 S. W. 75, 23 L. R. A. 264.) This Act was considered by the supreme court of the United States in *St. Louis etc. Ry. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746. The court held that it did not violate any provision of the Fourteenth Amendment, and said: "Corporations are the creations of the state, endowed with such faculties as the state bestows and subject to such conditions as the state imposes, and, if the power to modify their charters is reserved, that reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligation; and as this amendment rested on reasons deduced from the peculiar character of the business of the corporations affected and the public nature of their functions, and applied to all alike, the equal protection of the law was not denied."

Corporations are persons (*State ex rel. Sackett v. Thomas*, 25 Mont. 226, 64 Pac. 503; *Santa Clara County v. Southern Pac. Ry. Co.*, 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118; *Pembina Con. Silver M. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650), but not for all purposes. They have no inalienable rights. Being creatures of the statute, if the reservation in the Constitution means anything, it means that the legislature—the law-making power—may enact any legislation with reference to them, by way of amendment of the law creating them, which does not violate the rule laid down in *St. Louis etc. Ry. Co. v. Paul*, *supra*, that property acquired under the operation of the charter cannot be taken away and that contracts made in like manner may not be impaired.

It cannot be doubted that the legislature, in enacting the general laws on the subject (Civ. Code, Div. I, Pt. IV), might

have incorporated in them the section of the Act of 1903 in question. It would then have been a part of the charter of every railroad company organized under the laws of this state. The defendant is a foreign corporation, having come into this state to operate a railroad. It cannot occupy any higher ground than a domestic corporation engaged in the same kind of business. (Const., Art. XV, sec. 11.) If the legislature in its discretion concluded that it would secure the safety of railroad employees, and thus stimulate these corporations to exercise a greater care in selecting them, so that the safety of themselves and of the passengers and freight would be better guarded, it had the power to enact legislation necessary to accomplish that purpose. and foreign corporations, as well as domestic, must obey it.

We hold that the law in question is a valid exercise of legislative power, and is not open to the constitutional objection made.

Counsel, however, have called our attention to the case of *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, and insist that it supports their contention. A statute of Texas imposed a fee not to exceed \$10, in addition to costs, upon railway corporations which failed to pay *bona fide* claims for personal services rendered, or labor done, or for damages, or for overcharges for freight, or for stock killed or injured by trains, within thirty days after presentation at the proper station of the road. The Act applied to no other corporation or person. The Texas court held it valid. But on error the supreme court of the United States held it unconstitutional as denying the equal protection of the laws. The statute can, in principle, be readily distinguished from the one now under consideration. It imposed a penalty upon the railroad corporations only for failure to pay their debts promptly, exempting other corporations and natural persons, whereas a like duty rested upon all. It therefore ignored the rule of equality and made an arbitrary classification for purposes not falling properly under the scope of the police power of the state, upon the theory of a special duty resting upon railroad corporations by reason of the peculiar character of the business in which they were engaged.

The same may be said of the case of *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804, 82 Pac. 833. In this case was involved the question whether the statute prohibiting monopolies in this state was in violation of the Fourteenth Amendment, by reason of the fact that it expressly excepted from its operation combinations for the purpose of enhancing the price of horticultural and agricultural products. The statute was highly penal. The exception created an arbitrary classification by which some persons engaged in industrial pursuits were punished for creating monopolies, while others, who occupied the same relation to these pursuits, were expressly exempted. Neither of these cases is applicable here.

2. Counsel contend that the award by the jury of \$17,400 for the loss of the left hand is so manifestly excessive that it is apparent that the jury acted from passion and prejudice; that the state of mind thus exhibited must have influenced the jury in determining the question of liability against the defendant from evidence upon which they might have found in its favor; and hence a case is presented in which the inherent vice of the verdict cannot be cured by a reduction of the amount of it.

It was said in *Helena & Livingston S. & R. Co. v. Lynch*, 25 Mont. 497, 65 Pac. 919: "Courts are reluctant to interfere with the verdict of a jury, and will not do so, on the ground of excessive damages given under the influence of passion and prejudice, unless it is apparent that their feelings of passion and prejudice have entered into and influenced their decision. Where it is apparent that this is the case, a new trial should be granted, unless it is also apparent that the verdict is otherwise correct, and the ends of justice will be fully served by requiring the successful party to remit the excess. In the latter case, however, it should appear that upon the facts the successful party is clearly and as a matter of law entitled to a verdict in some amount, and that the prejudice and passion of the jury have gone no further than to lead them to swell the amount of damages; otherwise, all their deliberations must be deemed to have been permeated by their feelings, and the decision as a whole the

result of passion, rather than of their calm, deliberate judgment."

The evidence touching the question whether the injury resulted from the negligence on the part of the engineer, or from the act of the plaintiff in assuming a position more dangerous than was necessary, is conflicting; but it is sufficient to sustain the finding of the jury on this point. If the verdict had been for \$5,000, we apprehend there would be no complaint.

Can it be said that the comparatively large amount found is, of itself, sufficient to make it apparent that the jury were prompted by improper motives? In all such cases the amount to be awarded is left to the jury, under the facts of the particular case. This discretion covers a very wide range. The court cannot lay down any definite or fixed standard of measurement. One jury upon the same facts will award one amount, and another a larger one; yet both may come within the limits of fair discretion. In any case, the amount allowed may not be held to be determinative, unless it be so outrageously disproportionate to the injury as to shock the moral sense. (*Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 34 Mont. 545, 115 Am. St. Rep. 546, 87 Pac. 963; *Wilson v. Fitch*, 41 Cal. 363.)

In a given case, it may be that the amount awarded is due to miscalculation, or based upon a wrong standard. In such cases the excessive award is not the result of passion or prejudice, but the result of an honest mistake; and in any case there is no presumption of wrongdoing, unless the award is so grossly out of proportion to the injury, looking to all the circumstances, as that it cannot be otherwise accounted for; for the statute (Code Civ. Proc., sec. 1171, subd. 5) allows a new trial on the ground of passion or prejudice, only when one or the other is apparent.

In this case the court instructed the jury that in fixing the amount of damages, if they found the defendant liable, they should take into consideration mental and physical pain suffered and to be suffered, the disfigurement of plaintiff's per-

son, and the impairment of his earning ability. There is no complaint made of the instructions. Evidence was submitted showing that the plaintiff was earning at the time of the injury \$100 per month, and that the expectancy of a man of his age (37) was 29.44 years. Evidence was further introduced showing the cost of an annuity of \$100, payable annually, semi-annually, or quarterly. The lowest price fixed was upon the basis of annual payment, and was \$1,767. It was also shown that the plaintiff can now earn not to exceed \$600 per year. Accepting this as the basis of calculation, the impairment of capacity amounts to \$600 per year. Multiply the cost of an annuity of \$100 by this amount, and the result is \$10,602, allowing nothing for other elements of damage. It is more likely that the jury found, as they might have done, that the impairment of earning capacity was greater, and hence for this reason increased the amount, making no allowance for the impairment of earning capacity by reason of increasing age. To say the least, the amount of the award is well within the purview of the evidence as it was submitted to the jury. Any excess may just as well have been the result of the adoption of the annuity standard submitted to them, as it was, under the instructions, without a direction that they should also consider the fact that earning capacity diminishes as age advances. The circumstances do not make so clearly apparent the presence of bias or prejudice as to warrant a new trial on this ground.

The action of the trial court in granting the motion conditionally is justified by the case of *Kennon v. Gilmer*, 9 Mont. 108, 22 Pac. 448. Looking to all the evidence in the case, the court might very well, in its discretion, pursue the course that was adopted in that case, and diminish the amount of the verdict as it did. It doubtless proceeded upon the theory that the large amount of the award was due to a mistake in the basis of calculation.

This court, in *Bourke v. Butte El. & P. Co.*, 33 Mont. 267, 83 Pac. 470, declared the rule that compensation for impaired ability to earn money should be made upon the principle that

the plaintiff is entitled to an annuity equal to the difference between his annual earnings before his injury, and the amount, if any, he might be able to earn thereafter. This statement of the rule excludes the element of advancing age, which should always be taken into account where earning capacity depends upon physical strength. Necessarily, a man's physical condition becomes impaired by advancing age, and, as a consequence, his earning power is diminished thereby.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

STATE, RESPONDENT, v. MCCARTHY, APPELLANT.

(No. 2,455.)

(Submitted November 5, 1907. Decided November 23, 1907.)

[92 Pac. 521.]

*Criminal Law—Grand Larceny—Evidence—Insufficiency—
Cross-examination—Accomplices—Corroboration—Record—
Review—Instructions.*

Criminal Law—Evidence—Insufficiency—Duty of Court.

1. Where, in a criminal cause, there is no substantial evidence to support a verdict of guilty, it becomes the duty of the district court, as a matter of law, to vacate and set it aside, and refusal so to do is reversible error.

Same—Grand Larceny—Evidence—Insufficiency—Review.

2. Evidence examined and held insufficient to sustain a conviction of the crime of grand larceny.

Same—Evidence Necessary to Convict.

3. Mere suspicions or probabilities, however strong, are insufficient to convict of crime. There must be some substantive testimony to justify a judgment of conviction.

Same—Grand Larceny—Accomplices—Evidence—Guilty Intent.

4. The testimony of a woman, an alleged accomplice of defendant charged with grand larceny, relative to an understanding she had with him that, when present in a winchroom adjacent to defendant's saloon, she was to induce men to drink excessively so as to more readily be

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able to get hold of their money, was competent as tending to show a system or plan uniformly pursued, and thus to show guilty knowledge or criminal intent.

Same—Evidence—Accomplices—Corroboration.

5. Under Penal Code, section 2089, the testimony of an accomplice is insufficient to support a conviction, unless corroborated by other evidence which, in itself and independently of that of the accomplice, tends to connect the accused with the crime alleged to have been committed.

Same—Grand Larceny—Evidence—Cross-examination.

6. In a prosecution for grand larceny where the prosecuting witness claimed to have been deprived of his property while in the winerom adjoining defendant's saloon with an alleged female accomplice of defendant, it was error to refuse permission to defendant's counsel, on cross-examination of the woman, to interrogate her as to whether the complaining witness had an act of sexual intercourse with her on the floor of the room. The offered testimony was competent as showing what opportunity the woman had to take the money without the aid or knowledge of the defendant.

Same—Record—Review—Instructions.

7. Where the record in a criminal cause, tried after Chapter 82 of the Laws of 1907, page 197, went into effect, providing that the trial court shall pass upon any objections to instructions requested or proposed to be given, and that the court stenographer shall be present at the settlement of the instructions and note all objections and exceptions of counsel to those given or refused, does not show that the court ruled, or was requested to rule, on defendant's requests for instructions or his objections to those given, errors relating to them will not be considered on appeal, since error cannot be predicated on the mere silence of the court.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

W. H. MCCARTHY was convicted of grand larceny, and appeals from the judgment of conviction and from an order denying him a new trial. Reversed and remanded.

Mr. Jesse B. Roote, Mr. Peter Breen, Messrs. Barta & Barta, and Mr. A. C. McDaniel, for Appellant.

The main fact in controversy in this case was, Did the appellant steal the money charged in the information? And any other facts tending to connect other offenses were irrelevant and incompetent testimony. (*Berney v. State*, 69 Ala. 233; *Whilden v. State*, 25 Ga. 396, 71 Am. Dec. 181; *People v. Corbin*, 56 N. Y. 363, 15 Am. Rep. 427.) As to the statements of an accomplice after the commission of the crime, confessions by

an accomplice in crime not made in the presence of the defendant, nor during the commission of the offense or in its furtherance, and not part of the *res gestae*, are not admissible against the defendant. (*State v. English*, 14 Mont. 399, 36 Pac. 815.) Nor, even if a conspiracy is shown *aliunde*, are the declarations of one conspirator admissible against the others, if not made during the prosecution of the undertaking, but after the common design is accomplished or abandoned. (*State v. Duncan*, 64 Mo. 262.)

The law does not permit a decision to be made on remote inferences. (*Dyson v. State*, 26 Miss. 362; *Rye v. State*, 8 Tex. App. 153; *United States v. Ross*, 92 U. S. 282, 23 L. Ed. 707.)

One of the objects of cross-examination is to elicit the whole truth of the transactions only partly explained. Questions intended to follow up designed or accidental omissions of the witness, or to call out facts to contradict, explain or modify some inference which might otherwise be drawn from the testimony, are legitimate cross-examination. (*People v. Russel*, 46 Cal. 121; *Reiser v. Portere*, 106 Mich. 102, 63 N. W. 1041; *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286; *Yeoman v. State*, 21 Neb. 171, 31 N. W. 669; *Haynes v. Ledyard*, 33 Wis. 319; *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502; *People v. Gordon*, 103 Cal. 568, 37 Pac. 534; *Vogel v. Harris*, 112 Ind. 494, 14 N. E. 385; *Hay v. Reed*, 85 Mich. 296, 48 N. W. 507; *Davis v. Hayes*, 89 Ala. 563, 8 South. 131.)

It is necessary that the evidence corroborating an accomplice shall connect, or tend to connect, defendant with the commission of the crime. Corroborative evidence is insufficient where it merely casts a grave suspicion on the accused. It must not only show the commission of the offense and circumstances thereof, but must also implicate the accused in it. Hence, corroboration relating exclusively to the *corpus delicti* and the circumstances thereof will not sustain a conviction. (*State v. Geddes*, 22 Mont. 68, 55 Pac. 919; *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026; *State v. Calder*, 23 Mont. 504, 59 Pac. 903; *Taylor v. Commonwealth*, 10 Ky. Law Rep. 169, 8 S. W.

461; *Craft v. Commonwealth*, 80 Ky. 349; *People v. Plath*, 100 N. Y. 590, 53 Am. Rep. 236, 3 N. E. 790; *State v. O'Dell*, 8 Or. 30; *People v. Ames*, 39 Cal. 403; *People v. Compton*, 123 Cal. 403, 56 Pac. 44; *People v. Hoagland*, 138 Cal. 338, 71 Pac. 359; *State v. Willis*, 9 Iowa, 582; *Blois v. State*, 92 Ga. 584, 20 S. E. 12; *State v. Jarvis*, 18 Or. 360, 23 Pac. 251; *Childers v. State*, 52 Ga. 106; *State v. Welch*, 22 Mont. 92, 55 Pac. 927; *State v. Knudtson*, 11 Idaho, 524, 83 Pac. 226.)

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

The defendant in the above-entitled action was convicted in the district court of Silver Bow county of the crime of grand larceny, and appeals from the judgment and also from an order denying him a new trial.

Numerous errors were relied upon by his counsel for a reversal of the judgment and order, among others, that the court erred in overruling the motion for a new trial, for the reason that the evidence is insufficient to justify the verdict. If this motion should have been granted, it will be unnecessary for this court to examine many of the other questions raised by appellant.

In the case of *State v. Foster*, 26 Mont. 71, 66 Pac. 565, the court said: "The rule has frequently been declared by this court that an application for a new trial on the ground that the evidence is insufficient to justify the verdict, or that the verdict is contrary to the evidence, is addressed to the sound discretion of the trial court, and that, where there is a substantial conflict in the evidence, the action of that court in granting or denying the application will not be disturbed on appeal. If, however, there is no substantial evidence to support the verdict, a different rule applies. In the latter case it becomes the duty of the trial court, as a matter of law, to va-

cate and set aside the verdict, and, if it refuses to do so, its action will be held erroneous."

At the conclusion of the state's testimony, the defendant, through his counsel, requested the court to instruct the jury to bring a verdict of not guilty, "for the reason that there is no testimony whatever to connect this defendant with the commission of the crime, and no corroboration whatever of the testimony of the accomplice in this case." This instruction was refused.

The facts shown by the evidence are, substantially, as follows: William Wright, a resident of Pony, Montana, arrived in Butte between 2 and 3 o'clock on the morning of January 9, 1907. He went to bed at a rooming-house near the railroad depot in South Butte a short time after his arrival, and arose about 7 o'clock the same morning, when he took two drinks of whisky, had his breakfast, boarded a street-car, and went to the central part of the city of Butte, where he remained until about 1 o'clock. He then returned to the vicinity of the railroad station in South Butte, and went into the defendant's place, which was a saloon directly across from the station. Earlier in the day he had met a man called "the Frenchman," in South Butte, and afterward met this man up town, had a drink or two with him, and they returned to South Butte on the street-car together. He says in his testimony that he "knocked around" South Butte for a few hours in the afternoon, and finally went into defendant's place, where he had another drink or two with the "Frenchman," and, as he was about to leave, the defendant McCarthy tapped him on the shoulder and said, "I want to introduce you to a friend of yours." He then went into a winerom in the rear of the saloon, where he met a woman, for whom he bought three or four drinks and with whom he took at least one drink himself. McCarthy did not remain in the winerom after introducing him to the woman, or, so far as the witness Wright knows, go back to the winerom again while Wright was there. Wright wore two pairs of overalls, in the pocket of the inner pair of which he had a

pocketbook containing about \$110, but, he says, he did not exhibit the bulk of his money to the woman in the winerom. She asked him how much money he had, but he refused to tell her. "Finally," he says, "the woman bought a drink," and, after taking it, he does not remember anything for about four hours. He testified that he went to sleep in the winerom, and, when he woke up, he was out in the barroom, sitting in a chair, and the defendant was sitting about three feet from him. There were several other persons in the room at this time. He felt for his money, and found that the pocketbook had been taken from his inner overalls pocket, and placed in the outer pair, and that the money was all gone, with the exception of \$3 or \$4. He made no complaint to McCarthy, but walked out of the saloon, and told some one on the outside that he had been robbed. While in the winerom, he gave the woman \$3. He does not know where he may have been between the time he went to sleep in the winerom, after he took the last drink, and the time he was awakened in the chair, but thinks that he must have been carried from the winerom to the outer saloon by some one. He was feeling all right when he awakened—the same as he usually felt when he woke up in the morning. He afterward went back to McCarthy's place, and took a drink with a stranger.

A witness, called May Miner, testified that she was the woman to whom Wright was introduced by McCarthy; that she had several drinks with him in the winerom, when he appeared to become very much intoxicated, became angry at her because she would not tell him the number of her room, and left the room. She started to leave a few moments later, and, as she was passing out of the door, she met the defendant McCarthy, who asked her, "Where is the money?" She indicated by a motion that Wright had it in his trousers pocket. She says that on the night in question she was sent for to come to McCarthy's place, where she had often been before; that she does not know who sent for her, but that she had an understanding with McCarthy, prior to this time, that, when she was in the

winerom, she should induce men to drink as much as possible. She testifies: "I knew what was expected—that I should drink with the gentlemen. Mr. McCarthy made the suggestion at one time that I might help the men to spend their money, but on this day, the 9th, I had not seen Mr. McCarthy until I went down to the saloon, and I saw him not at all after that evening. The only real understanding was that he [the man introduced] was to be induced to drink as much as possible for the purpose of getting all of his money. I know of two circumstances where men went away with no money; but there was only one case where the money was willfully taken away from the man to my knowledge. In that case a gentleman had been drinking wine and he refused to pay McCarthy, but McCarthy took the money; just simply for the wine; and in the other case the man had gone to sleep and was dropping his money, and I took it in my hand and called for McCarthy, and he took it, and gave me a part of it. This last man had been drinking, but he had been paying for his drinks as he got them. When McCarthy introduced Wright to me, I understood my duties to be the same as in other instances; that is, to induce him to drink as much as he would. I did not think when Wright first came into the room that he was at all intoxicated, but when he was leaving he seemed to be quite intoxicated. I saw his money that night when he took it out to pay for a drink. I never had any conversation with McCarthy regarding the method of procedure going on in that saloon with relation to strangers and their money. The only thing I understood was to have them drink. McCarthy never told me in so many words what he desired to have them drink excessively for, but there was a natural understanding from his first invitation for me to come there that women could induce men to drink when gentlemen could not. There was an understanding between McCarthy and me as to the reason why he desired them to drink much. I knew that the men that came there were often relieved of their money, and naturally supposed that was to be the case in the cases that I would be

called for. When the old gentleman got angry because he could not get the number of my room, he went out in the direction of the bar. He left there, and entered the saloon proper before I got out of the passage. I am positive of that. I did not interfere with him after he left there, and I did not see him any more."

On cross-examination of this witness, the defendant's counsel offered to prove that Wright and the woman had an act of sexual intercourse on the floor in the winerom. The county attorney objected to this line of cross-examination on the ground that it was irrelevant and immaterial, and the court sustained the objection, the defendant excepting to the ruling of the court.

The witness Hoolihan testified that he was a checker for the Butte Transfer Company, and, as such, his duties were to check baggage on the trains in and out of Butte; that some time prior to January 9th McCarthy had requested him, in substance, if he became acquainted with any travelers who desired to spend their money to bring them over to McCarthy's saloon, and that in one instance McCarthy invited a man who had been taken over there by the witness to go back into the winerom and meet a woman. The foregoing is, in substance, all of the testimony introduced by the state.

The defendant did not go on the witness stand; but a witness, Edward Dwyer, the night bartender in defendant's saloon, testified that on the evening of the 9th about 9:30 o'clock, Wright came out of the winerom and treated three or four men at the bar, including the defendant McCarthy. This witness also testified that Wright did not sit down and go to sleep in the saloon at any time that night; that on the following morning Wright walked into the saloon as the witness was about to leave his work, and they had a drink together; and that Wright left the saloon the evening before with the "Frenchman."

The witness Frank Smith testified for the defendant that he saw the complaining witness, Wright, about 9 o'clock on the evening of January 9th drinking at the bar in defendant's

saloon, and that, when he left the place, he was accompanied by the "Frenchman." This witness also stated that Wright afterward spent considerable money around the saloons and lunchrooms in South Butte, and that Wright told him the next morning that he did not know who robbed him, or where he was robbed, but that he thought the woman got his money, that it must have been some one "pretty slick that got him, because he was awake all the time, and knew what he was doing, and he thought it was the woman who got his money, because he was wide awake, and that she must have got it." Wright afterward contradicted all of the testimony of this witness.

The defendant also produced in evidence a subpoena for the witness Harry Clifford, known as "the Frenchman," which had been regularly served on Clifford, but to which he failed to respond; and it was also shown that, upon a warrant being issued for his arrest, his whereabouts could not be ascertained.

The theory of counsel for the state at the trial was, that the defendant and the witness May Miner had engaged in a common purpose to induce men to drink in the saloon and to rob them when they became intoxicated. It was upon this theory that testimony was elicited from the woman as to the experiences of other men who had been introduced to her by McCarthy. But, as was said in the case of *State v. Foster, supra*, conceding, for the sake of argument, that all of this character of evidence was competent and material to show a conspiracy to commit larceny by the defendant and his associates, and that it is sufficient to establish such a conspiracy, there is no evidence in the record to justify the conclusion that either of them committed the particular larceny in question. There must be some substantive testimony to justify the judgment of a court. (*Olsen v. Montana Ore Pur. Co.*, 35 Mont. 400, 89 Pac. 731; *Howie v. California Brewing Co.*, 35 Mont. 264, 88 Pac. 1007.) Mere suspicions or probabilities, however strong, are not sufficient basis for a conviction of crime.

We think the testimony of the woman as to her understanding with the defendant and their former acts in conformity

thereto was competent. In the case of *State v. Newman*, 34 Mont. 434, 87 Pac. 462, this court held that proof may be made by the state of facts tending to show a uniform course of action recently pursued—a system or plan on the part of the accused—for the purpose of showing guilty knowledge or criminal intent. (See, also, 12 Cyc. 411.)

Eliminate the testimony of May Miner, and there is no evidence tending to connect the defendant with the loss of the money by Wright, except the fact—which in itself was non-criminal—that he introduced the complaining witness to the woman. If defendant and the woman were co-conspirators, then she was an accomplice, and her testimony was not corroborated by other evidence, which in itself, and without the aid of her testimony, tended to connect the defendant with the commission of the offense charged. (Pen. Code, sec. 2089.) Wright's testimony did not tend to corroborate that of the woman, because upon the very point as to which it required corroboration, to-wit, his becoming unconscious in the winerom, she contradicted him by testifying that he left the room before she did. There is nothing in the record to corroborate her statement that the defendant inquired where Wright carried his money. In giving that bit of testimony, she may have been trying to shield herself by directing suspicion toward McCarthy.

We think the testimony was wholly insufficient to warrant a verdict of guilty, and should not have been submitted to the jury.

We are also of opinion that the defendant was entitled to prove every act of Wright and the woman in the winerom. The testimony offered, while offensive, was nevertheless legally competent, as showing what opportunity the woman had to take Wright's money without the aid or knowledge of the defendant.

The appellant assigns error upon the action of the court in giving certain instructions to the jury, and refusing to give others proposed and requested by him. We do not pass upon the correctness of the instructions, either given or refused. The

Tenth Legislative Assembly (Laws 1907, Chapter 82, p. 197) revised the practice of the courts in regard to instructions to juries, by providing, among other things, that the court shall pass upon any objections to instructions requested, and also those proposed to be given by the court. It also provided that the court stenographer shall be present at the settlement of the instructions, and shall take down all the objections and exceptions of counsel to all and any of the instructions given or refused by the court, together with the modifications made therein, and the ruling of the court thereon. It does not appear by the record that the court ever ruled, or was ever requested to rule, on either the defendant's requests for instructions or his objections to those given by the court. Error cannot be predicated upon the mere silence of the court. (*State v. Biggerstaff*, 17 Mont. 510, 43 Pac. 709.) Therefore we do not consider the alleged errors relating to the instructions. As to how specific the bill of exceptions should be in disclosing what took place at the settlement of the instructions we do not decide, because the point has not been argued in this case, and we do not deem it wise to construe the new law without the assistance of argument by counsel.

The judgment and order of the district court of Silver Bow county are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. PAISLEY, APPELLANT.

(No. 2,451.)

(Submitted November 8, 1907. Decided December 2, 1907.)

[92 Pac. 566.]

*Criminal Law—Robbery—Prior Convictions—Information—
Punishment—Instructions—Flight and Concealment—Alibi—
Police Officers—Detectives—Credibility.*

Criminal Law—Robbery—Taking of Property Without Resistance.

1. *Obiter*: The taking of personal property from the person or immediate presence of another without resistance on his part does not bring the offense within the definition of robbery. (Pen. Code, sec. 390.) To constitute that crime the element of force or fear must be present.

Same—Robbery—Information—Degree of Force.

2. Since section 390 of the Penal Code does not define the degree of force necessary to constitute the taking of personal property from the person or immediate presence of another the crime of robbery, an information charging such offense need not allege the degree of force used in accomplishing it.

Same—Robbery—Force or Fear—Information—Sufficiency.

3. Assuming that an information charging robbery was defective in not stating facts sufficient to allege fear, within the statutory definition (Pen. Code, sec. 391), on the part of the person robbed, still, the allegation of force, the alternative element of the crime, having been sufficient, the pleading was not vulnerable to attack.

Same—Prior Convictions—Information—Essentials.

4. In an information charging, *inter alia*, a prior conviction of an offense in another state which, in this state, is punishable by imprisonment in the state prison, it is unnecessary to allege the facts constituting the crime in the foreign state, and it is immaterial whether the offense for which defendant is alleged to have been previously convicted in the sister state is a felony there. It is sufficient, under section 2146 of the Penal Code, to allege the fact of defendant's prior conviction of a named offense, indicating the court which rendered the judgment and the date thereof.

Same—Robbery—Prior Convictions—Information—Harmless Error.

5. Defendant was charged with robbery and prior convictions in Colorado of the crimes of burglary and assault on rob. The latter crime is not known under the Penal Code of this state. The prior conviction of burglary was sufficiently alleged. The jury found a verdict of guilty and that the charges of both prior convictions were true. *Held*, that, even assuming that the charge of a prior conviction for an assault on rob was insufficient, that offense being unknown in this state, this technical error in pleading will not work a reversal, if the punishment imposed does not exceed the limit which could properly be imposed upon conviction of the crime of robbery and the finding of a prior conviction of burglary.

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Same—Robbery—Prior Conviction of Burglary—Punishment—Statutory Construction.

6. Defendant was convicted of the crime of robbery, the penalty for which offense may be, under Penal Code, section 392, from one to twenty years' imprisonment. He was also found to have been previously convicted in a foreign state of burglary. The court imposed a sentence of fifty years in the state prison. Subdivision 1 of section 1232, Penal Code, provides that one, once convicted of a felony who is thereafter again convicted of an offense which would be punishable upon a first conviction by imprisonment in the state prison for any term exceeding five years, is then punishable by such imprisonment for not less than ten years. *Held*, that the meaning of subdivision 1 above is, that if the maximum punishment for the offense for which defendant was on trial (robbery in this instance) is more, but not less, than five years' imprisonment, then his punishment could not be less than ten years, and might be extended to life imprisonment; and, hence, that the sentence of fifty years in this case was not unwarranted by law.

Same—Prior Conviction—Information—Surplusage.

7. Since all that is required to be alleged in an information charging, among other things, a prior conviction, is, that defendant was convicted of a named offense, in a certain court on a given date, an allegation that defendant, having in March, 1902, been sentenced to a term of seven years, "did so serve said time" was surplusage; so that defendant's contention that the information charged an impossible state of facts, inasmuch as at the time of trial in March, 1906, only four years had elapsed, has no merit.

Same—Robbery—Prior Conviction—Punishment—Instructions—Harmless Error.

8. Where defendant was charged with robbery and prior convictions, the giving of an instruction, on the question of punishment, embracing all the subdivisions of section 1232, Penal Code, while only subdivision 1 should have been given, subdivisions 2 and 3 having reference to offenses the punishment for which is five years or less, was improper, but rendered harmless by an instruction embodying the provisions of section 392, Penal Code, prescribing the maximum punishment for robbery at twenty years' imprisonment.

Same.

9. Nor was the giving of instructions defining burglary and prescribing its punishment prejudicial, in the above case, where defendant was also charged with having been previously convicted of burglary; while it would have been sufficient to have charged the jury that such latter offense was punishable by imprisonment in the state prison, the fact that the court was more elaborate in this respect than was necessary could not have harmed defendant, since what the court did say was correct.

Same—Instructions—Appeal—Record—Presumptions.

10. An instruction was given by the court in a prosecution for robbery, referring to "the last two instructions" on the subject of punishment which might be inflicted. Neither of these instructions, however, dealt with that subject. The jury, after retiring, returned into court and requested further instructions relative to the matter of punishment. Such instructions were given, but the record was silent as to their nature. The certificate of the clerk was to the effect that the record contained copies of all papers constituting the judgment-roll. *Held*, that, since it is incumbent upon appellant to point out the specific error upon which he relies, and since proper instructions on the sub-

-ject of punishment were given, in the absence of anything to show which instructions were given in response to the request of the jury, the presumption in favor of the action of the trial court will be indulged.

Same—Flight and Concealment—Instructions.

11. An instruction which substantially told the jury in a criminal action that if they were satisfied that the crime charged in the information had been committed by some one, they might then, in determining the defendant's guilt, take into consideration any testimony showing or tending to show flight or concealment on his part, was correct.

Same—Alibi—Instructions—Burden of Proof.

12. Where the jury in a criminal cause had been properly instructed that the burden of proving, beyond a reasonable doubt, that defendant was present and participated in the alleged crime, a subsequent one stating simply that one of the defenses interposed by defendant was an *alibi* and defining that term, was not objectionable as impliedly casting the burden of proving that defense upon the defendant.

Same—Requested Instructions—Refusal—When not Error.

13. The refusal of defendant's requested instructions is not error, where the matter embraced in them is fully covered by those given.

Same—Evidence—Police Officers—Detectives—Credibility—Instructions.

14. An instruction, requested by defendant charged with crime, to the effect that, in weighing the testimony given by police officers and detectives, the jury should exercise greater care than in the case of other witnesses, because of the natural and unavoidable tendency and bias of such persons to construe everything as evidence against the accused and disregard all matters which did not tend to support their preconceived opinions of the case, was properly refused. If given, it would have invaded the province of the jury and been erroneous under any circumstances.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

WILLIAM PAISLEY was convicted of robbery, and appeals from the judgment of conviction. Affirmed.

Mr. Jesse B. Roote, Mr. Peter Breen, and Mr. J. Bruce Kremer, for Appellant.

The charges for prior conviction are fatally defective for failure to allege the law of the state of Colorado to show that the acts alleged were felonies in that state. (*Commonwealth v. Finn*, 27 Ky. Law Rep. 771, 86 S. W. 693; *State v. Dorr*, 82 Me. 341, 19 Atl. 861; *State v. Conwell*, 80 Me. 80, 13 Atl. 49; *Stevens v. People*, 1 Hill, 261; *Wood v. People*, 53 N. Y. 511.)

In charging a statutory offense nothing can be taken by indictment, but all the facts and circumstances necessary to bring the defendant within the terms of the statute must be alleged;

and where a statute enumerates several elements as combining to create a crime, the crime cannot properly be described without including all these elements. There is no allegation in the information stating facts which bring the offense of robbery within the definition of fear as defined in section 391, Penal Code. (*State v. Howerton*, 59 Mo. 91; *State v. Helm*, 6 Mo. 264; *State v. Jenkins*, 36 Mo. 372; *Slover v. Territory*, 5 Okla. 506, 49 Pac. 1009; *United States v. Dickey*, 1 Morris (Iowa), 412; *State v. Daggs*, 106 Mo. 160, 17 S. W. 306; *Koster v. People*, 8 Mich. 431; *Bush v. Republic*, 1 Tex. 455; *State v. Dicker*, 52 Kan. 193, 34 Pac. 780; *State v. Emerick*, 87 Mo. 110.)

The information is further insufficient for the reason that it does not state the force used, the kind or manner of it. (*State v. John*, 50 N. C. 163, 69 Am. Dec. 777.) Force that is used merely to snatch or take away property from the person of another, without any resistance on his part, is not sufficient to constitute robbery. (*Spencer v. State*, 106 Ga. 692, 32 S. E. 849; *Bonsall v. State*, 35 Ind. 460; *Routt v. State*, 61 Ark. 594, 34 S. W. 262; *Jackson v. State*, 114 Ga. 826, 88 Am. St. Rep. 60, 40 S. E. 1001; *Territory v. McKern*, 2 Idaho, 759, 26 Pac. 123; *Hall v. People*, 171 Ill. 540, 49 N. E. 495.)

The court erred in giving instruction No. 15. This instruction in so many words tells the jury that flight or concealment is relevant testimony for the prosecution from which guilt may be proven beyond a reasonable doubt. This is clearly erroneous. (*Aaron v. State*, 39 Ala. 684; *Hussey v. State*, 86 Ala. 34, 5 South. 484; *Logg v. People*, 92 Ill. 598; *Mullins v. People*, 110 Ill. 42; *Godwin v. State*, 73 Miss. 873, 19 South. 712; *Williams v. Commonwealth*, 72 Ky. 274; see, also, *Alberty v. United States*, 162 U. S. 499, 16 Sup. Ct. 864, 40 L. Ed. 1051; *People v. Wong Ah Ngow*, 54 Cal. 151, 35 Am. Rep. 69; *People v. Hong Tong*, 85 Cal. 171, 24 Pac. 726; *State v. Arthur*, 23 Iowa, 430.)

In criminal prosecutions the testimony of detectives and police officers should be cautiously scrutinized in connection with all the circumstances proven. (*State v. Miller*, 9 Houst. 564, 32

Atl. 137; *Heldt v. State*, 20 Neb. 492, 57 Am. Rep. 835, 30 N. W. 626; *People v. Whitney*, 105 Mich. 622, 63 N. W. 765; *Hostetter Co. v. Bower*, 74 Fed. 235; *State v. Shew*, 8 Kan. App. 679, 57 Pac. 137.)

The refusal to give an instruction to this effect was held error in *Preuit v. People*, 5 Neb. 377. In *Needham v. People*, 98 Ill. 278, an instruction as to the credibility of detectives was held proper and approved.

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General, for Respondent.

The information charging robbery in the language of the statute (Pen. Code, sec. 390) is sufficient without any allegation as to fear. (*State v. Clancy*, 20 Mont. 498, 52 Pac. 267; *State v. O'Neil*, 71 Minn. 399, 73 N. W. 1091; *Chappel v. State*, 52 Ala. 359; *Young v. State*, 50 Ark. 501, 8 S. W. 828; *State v. Simmons*, 124 Mo. 447, 27 S. W. 1108; *State v. Lawler*, 130 Mo. 366, 51 Am. St. Rep. 575, 32 S. W. 979; *State v. Patterson*, 42 La. Ann. 934, 8 South. 529; *People v. Riley*, 75 Cal. 98, 16 Pac. 544.) Nor was it necessary to allege the kind or degree of force employed or fear aroused. (*State v. Gill*, 21 Mont. 151, 53 Pac. 184; *State v. Clancy*, 20 Mont. 498, 52 Pac. 267; *State v. O'Neil*, 71 Minn. 399, 73 N. W. 1091.)

To instruct the jury that police officers and detectives have a "natural and unavoidable bias to construe everything as evidence against the accused, and disregard everything which does not tend to support their preconceived opinions" would be a direct invasion upon the province of the jury. It practically takes away from the jury the exclusive right of judging of the effect or value of the evidence addressed to them by, in effect, telling the jury that such testimony is valueless and without any weight whatsoever. In the case of *Preuit v. People*, 5 Neb. 377, cited by appellant, the court held that a refusal to give an instruction substantially like the above was error. However, we find no statute in Nebraska similar to section 3390 of the Code of Civil Procedure of this state. Under the great

weight of authority such instruction is clearly erroneous. (See *Blashfield on Instructions*, secs. 225, 227; *State v. Hoy*, 83 Minn. 286, 86 N. W. 98; *Pratt v. State*, 56 Ind. 179; *Veatch v. State*, 56 Ind. 584, 26 Am. Rep. 644; *Greer v. State*, 53 Ind. 420.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On March 24, 1906, the county attorney of Silver Bow county filed an information in the district court charging the defendant and appellant, William Paisley, with the crime of robbery. It was also charged in the information that in March, 1902, the defendant was convicted of the crime of burglary in the district court of Larimer county, Colorado; and it is further charged that in May, 1898, the defendant was convicted of the crime of assault to rob and burglary in the district court of Park county, Colorado. To this information the defendant entered a plea of not guilty. A trial was had, which resulted in a verdict finding the defendant guilty of robbery as charged, and which verdict also found that the charges of prior convictions were true. Upon this verdict there was rendered and entered a judgment against the defendant, fixing his punishment at imprisonment in the state prison for fifty years. From the judgment, the defendant appeals.

1. It is contended by the appellant that the information does not state facts sufficient to constitute the crime of robbery. Sections 390 and 391 of the Penal Code read as follows:

"Sec. 390. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

"Sec. 391. The fear mentioned in the last section may be either: (1) The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his, or member of his family; or (2) The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery."

The charging part of the information is as follows: "That at the county of Silver Bow, state of Montana, on or about the ninth day of January, A. D. 1906, and before the filing of this information, the said defendant, William Paisley, did willfully, unlawfully, intentionally, feloniously, and violently, and by means of force and putting in fear, take from the possession and from the immediate presence of one Thomas J. Mullane, and against the will of the said Thomas J. Mullane, three thousand five hundred and eighty-six dollars, lawful money of the United States of America, and of the value of three thousand five hundred and eighty-six (a more particular description of which said personal property is to the county attorney aforesaid unknown), which said personal property was then and there in the possession and in the immediate presence of Thomas J. Mullane, which said personal property was then and there owned by the Hennessy Mercantile Company, a corporation; and the said defendant, William Paisley, did violently, willfully, unlawfully, intentionally, feloniously, and by means of said force and putting in fear said Thomas J. Mullane, take, steal, and carry away the said personal property from the possession and immediate presence of the said Thomas J. Mullane, and against the will of said Thomas J. Mullane, with intent then and there in him, the said defendant, William Paisley, willfully, violently, unlawfully, feloniously, and intentionally, and by means of said force and putting in fear the said Thomas J. Mullane, take, steal, and carry away the said above-described personal property from the possession and immediate presence of the said Thomas J. Mullane and against his will, with intent in him, the said defendant William Paisley, to deprive and defraud the Hennessy Mercantile Company, a corporation, of its said personal property, the said Hennessy Mercantile Company, a corporation, being then and there the true owner of said property, and to appropriate the said personal property to his, the defendant's, own use."

In appellant's brief it is said that this information is insufficient, "in this: that it does not state what kind or man-

ner of force was used, or for what purpose the force was used." It is argued that, if the force used was only such as was necessary to take the money without resistance on Mullane's part, it was not the force contemplated by section 390 above, and we think the correctness of that proposition cannot be gainsaid; otherwise there would not be any distinction between robbery and larceny from the person. (*Territory v. McKern*, 3 Idaho, 15, 26 Pac. 123.) But the question before us is: Is it necessary for the pleader, in the information, to specify the particular kind or degree of force which was used? The particular kind and degree of fear necessary is defined in section 391 above; but there is not any definition or description whatever of the kind or degree of force required to make out the crime. The language of the statute is in the disjunctive. Either force or fear is sufficient, providing the fear is of that character mentioned in section 391.

In 24 Encyclopedia of Law (second edition), 996, it is said: "While the particular degree of force requisite to effect the crime is not defined by the common law, nor in many of the states by statute, if any injury is done to the person or there is any struggle by the party to keep possession of the property before it is taken from him, there will be a sufficient actual violence. If there is sufficient violence to effect and carry out the evil intent, its degree is not of much importance."

In *State v. Brown*, 113 N. C. 645, 18 S. E. 51, the contention was made that "no force is charged" in an indictment charging robbery; but the court said: "The charge that the defendant 'did make an assault,' * * * and 'put in bodily fear and danger of his life,' and 'then and there feloniously and violently did seize, take and carry away' \$10 in money from the prosecutor, is a very explicit allegation of force. Indeed, the words 'feloniously and violently' were of themselves sufficient."

The Minnesota Penal Code (Gen. Stats., 1894, sec. 6478) defines robbery as follows: "Robbery is the unlawful taking of personal property, from the person or in the presence of another, against his will, by means of force, or violence or fear

of injury, immediate or future, to his person or property, or the person or property of a relative or member of his family, or of anyone in his company at the time of the robbery." In *State v. O'Neil*, 71 Minn. 399, 73 N. W. 1091, the court said: "An indictment for a statutory offense is sufficient if it alleges the commission of the crime in the words of the statute, if by that means all that is essential to constitute the offense is directly charged; otherwise it is not. (*State v. Howard*, 66 Minn. 309, 61 Am. St. Rep. 403, 68 N. W. 1096, 34 L. R. A. 178.) The indictment in this case follows the words of the statute, and directly charges that the plaintiffs in error did unlawfully take from the person of Frank Johnson, against his will, by means of force and violence, \$1.50. This is a direct charge that the force and violence were employed to obtain possession of the money. The degree of force employed was immaterial, and it was not necessary to allege that it was such as to put Johnson in fear of immediate injury to his person, or that of some one in his company."

The information in this case is in substantially the same language as the information in the case of *State v. Clancy*, 20 Mont. 498, 52 Pac. 267, which information was held to be sufficient.

Since the Code does not define the degree of force necessary to constitute the crime, we hold that it is not necessary for the information to charge the degree of force used. The Code says that, if the taking was accomplished by force, it is sufficient; and we think that the allegation that the taking was by means of force is sufficient.

Again it is said: "There is no allegation in the information stating facts which bring the offense within the definition of fear as defined in section 391." But this contention may be disposed of in the language of this court in *State v. Clancy*, above, where it is said: "Without deciding whether the allegation with respect to fear is insufficient, because it omits to describe the kind of fear entertained by Carroll, we think the allegation of force, which is the alternative element in the of-

fense, rendered the information sufficient in this regard; fear being essential only in the absence of force. Eliminating the allegation of fear, the information would be good."

2. The next contention is that the allegations of prior convictions are not sufficient. The first of these allegations, omitting formal parts, is: "That heretofore, to wit, on the — day of March, 1902, the said defendant, William Paisley * * * was, by a judgment duly given and made by the district court of the state of Colorado, in and for Larimer county, convicted of the crime of burglary, and on said judgment was sentenced to serve a term of seven years in the state penitentiary of the said state of Colorado, and did so serve said time." The second is similar, except that it omits the words "and did so serve said time."

Of these allegations it is said by appellant: "They are fatally defective for failure to allege the law of the state of Colorado to show that such acts were felonies in that state"; and *Commonwealth v. Finn*, 27 Ky. Law Rep. 771, 86 S. W. 693, is cited in support of this view. But that case is not in point here. It appears from the opinion that in Kentucky a charge of former conviction is held to be a charge of a separate offense, for the court says: "The attempt of the commonwealth was to charge appellee by the second count in the indictment with the offense of being an habitual criminal." And, since the Code of that state requires that the indictment must be direct and certain as to the circumstances of the offense charged, the reason for the court's conclusion is apparent.

Particular stress is also laid upon the fact that in that case the indictment failed to state in what courts the defendant had been previously convicted. This is done in the information now before us. Furthermore, this court held in *State v. Gordon*, 35 Mont. 458, 90 Pac. 173, that the charge of prior conviction is not a charge of a separate offense, and therefore the reason for the conclusion of the Kentucky court is absent here.

Under our Code it is immaterial whether the crime for which the defendant is alleged to have been previously convicted is a felony in the foreign state. Section 1234 of the Penal Code reads as follows: "Every person who has been convicted in any other state, government, or county, *of an offense* which, if committed within this state, would be punishable by the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed in this state in the manner prescribed in the last two sections, and to the same extent as if such conviction had taken place in a court of this state."

Our only concern is to know whether the offense for which the defendant was convicted in Colorado is one which in this state subjects an offender to imprisonment in the state prison; and it is not necessary to allege the facts constituting the crime there, for they are not issuable facts. The defendant cannot now ask to have the question of his guilt or innocence of the crime charged against him in Colorado determined. The only issuable fact in this respect is: Was the defendant convicted of the offense named in Colorado? Section 2146 of the Penal Code is conclusive of this. It provides, among other things: "Whenever the fact of a previous conviction of another offense is charged in an indictment or information," etc. Under this statute, all that the pleader is required to do is to allege the fact that the defendant had theretofore been convicted of an offense, naming it, and giving the date and court which rendered the judgment. Courts of other states having different statutes may hold "a contrary view; but we are satisfied that our conclusion is the only one which can be sustained by reason, in view of the provisions of our statutes. This is true of all offenses known to our law. But, if the offense is not known to our law, then the statutes above do not govern, and a different rule would have to be applied.

Assuming that the allegations of a prior conviction of the crime of assault to rob are not sufficient, since such a crime by that name is not known to our law, still it does not follow that this judgment must be reversed. The only purpose of such

allegations in any event is to warrant more severe punishment than can be imposed for the particular crime for which the defendant is on trial. If the allegations of the prior conviction of burglary are sufficient, and the punishment imposed in this instance does not exceed the limit which might have been imposed in case of a prior conviction, this court would not be warranted in reversing the judgment, in view of the provisions of sections 2320 and 2600 of the Penal Code. (*State v. Gordon, supra.*)

3. But it is urged with particular emphasis that the punishment imposed in this instance was not warranted by law. This contention must be resolved by reference to sections 392 and 1232 of the Penal Code, which provide:

"Sec. 392. Robbery is punishable by imprisonment in the state prison for a term not less than one year nor more than twenty years."

"Sec. 1232. Every person who, having been convicted of any offense punishable by imprisonment in the state prison, commits any crime after such conviction, is punishable therefor as follows:

"(1) If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender would be punishable by imprisonment in the state prison for any term exceeding five years, such person is punishable by imprisonment in the state prison not less than ten years.

"(2) If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the state prison for five years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the state prison not exceeding ten years."

It is said that subdivision 1 of section 1232 is only applicable to crimes the minimum punishment for which exceeds five years' imprisonment, and, since robbery may be punished by imprisonment for a term of one year, this defendant, if punishable at all, could only be punished under subdivision 2 of section 1232, wherein the maximum is fixed at ten years' imprison-

ment; but we cannot agree with the construction of this section for which appellant contends. What is meant by the language employed in subdivision 1 of that section, "would be punishable for any term exceeding five years"? "Punishable" is defined in Webster's International Dictionary as "deserving of or liable to punishment; capable of being punished by law or right." As used in this section, we think it means liable to punishment. Substituting this definition for the word "punishable," subdivision 1 above would read as follows: "If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender would be liable to punishment by imprisonment in the state prison for any term exceeding five years, such person is punishable by imprisonment in the state prison not less than ten years." In other words, we think this subdivision means that, if the maximum punishment is more, but not less than five years' imprisonment, then the punishment for the offense for which the appellant was being tried under the circumstances could not be less than ten years, and might be extended to life imprisonment.

The appellant's case comes squarely within the meaning of subdivision 1 above, as we have thus construed it; and the court was therefore fully warranted, so far as this record discloses, in meting out the punishment which it did.

4. But it is said that an impossible state of facts is disclosed by the information, in that it is alleged that the defendant was sentenced in 1902 to a term of seven years' imprisonment in the Colorado penitentiary, and did serve said time; and, since seven years have not yet elapsed, the information in effect charges that while the defendant was incarcerated in the Colorado penitentiary he committed robbery in Montana. But, as we have said above, all that was required of the pleader was to state—as he does in this information—that the defendant "on the — day of March, 1902, was by a judgment duly given and made by the district court of the State of Colorado, in and for Larimer county, convicted of the crime of burglary"; and

the remaining portion of the allegation, "and on said judgment was sentenced to serve a term of seven years in the state penitentiary of the said state of Colorado, and did so serve said time," may be disregarded as surplusage, for whether he ever served a day of his term of imprisonment is entirely immaterial under section 2146 above. No issue could have been raised or tried upon that question. The supreme court of Missouri in *State v. Austin*, 113 Mo. 538, 21 S. W. 31, has held to a contrary view—whether under a statute similar to our own we do not know—but, in any event, we are not able to reach any different conclusion from a consideration of the provisions of our Penal Code.

5. Exception is taken to instruction No. 9, given by the court, which copies all of section 1232 above. We think the court should not have given subdivision 2 or 3; but having given an instruction embodying the provisions of section 392, it seems impossible that the jury could have been misled or confused by embracing in instruction No. 9 the portions of section 1232 which were not applicable to this case. And what we have just said is equally applicable to instruction No. 18.

6. While the giving of instruction No. 10 was erroneous, it was error without prejudice. The jury did not fix the punishment, but left it for the court to fix; and since the punishment prescribed by the court is within the limit fixed by the statute, the defendant cannot complain of this technical error, which manifestly did not work to his prejudice.

7. In order to enable the jury to fix the punishment, if they decided to do so, the court gave instructions 11 and 12, defining burglary and the punishment for that crime. This was proper, since the defendant was charged with having been previously convicted of the crime of burglary. The court might in so many words have told the jury that in this state burglary is punishable by imprisonment in the state prison; but the fact that the court, in doing this, was more elaborate than was necessary, is of no moment, since what the court did tell the jury was correct.

8. Exception is also taken to the giving of instruction No. 13. This is another instruction relating to punishment, but is confusing in that it refers to "the last two instructions," while neither of the two instructions immediately preceding No. 13 relates to the matter to which the court was trying to direct the attention of the jury. The record does show, however, that after the case had been submitted to the jury, and the jury had considered the same for some time, the jury "now return into open court, and request the court for further instructions as to punishment, thereupon defendant objects to the court giving further instructions to the jury, which objections are by the court overruled, and instructions in accordance with the request of the jury are by the court given. Thereupon the jury retires," etc.

The record does not advise us what further instructions the court gave in response to the jury's request. The Code provides that in such a case the court must give such additional instructions, in the presence of the county attorney, the defendant, and his counsel (Pen. Code, sec. 2123), and that such instructions shall be in writing (Pen. Code, sec. 2070, as amended by Act of February 15, 1901; Sess. Laws 1901, p. 173). The instructions are a part of the record of the case or judgment-roll. (Pen. Code, sec. 2229.) The certificate of the clerk is to the effect that the record contains a copy of all papers constituting the judgment-roll; so that such additional instructions so given by the court must be contained in this record, though not by any particular designation. The instructions dealing with the question of punishment are 9, 12, 13 and 18; and since every presumption is in favor of the judgment of the district court, and it is incumbent upon the appellant to point out the specific error upon which he relies, in the absence of anything to show which of these instructions was, or which instructions were, given in response to the request of the jury, we must presume in favor of the action of the trial court; and if, in response to such request, the court gave instruction No. 9, while it includes more than it should, it is not erroneous, as we have

already decided, and by Nos. 11 and 12 doubtless the jury was fully instructed upon the subject. At least, the record fails to show reversible error in giving instruction No. 13.

9. Complaint is made of instruction No. 15. Of course, this instruction is not technically correct. The opening sentence in part is: "Flight or concealment is relevant testimony," etc. Of course, that is not true as a matter of fact. What the court meant to say was that testimony showing or tending to show flight or concealment is relevant testimony; but this is not the objection urged. A correct statement is contained in the body of the instruction.

In appellant's brief it is said that this instruction directly told the jury that "flight or concealment is relevant testimony for the prosecution * * * from which guilt may be proven beyond a reasonable doubt." But this is not what the instruction says. That statement in the brief omits the very important phrase, "and it comes in with other incidents." The word "incidents," as here used, means circumstances. The first part of the instruction assumes to lay down a general proposition of law which is made applicable to the particular case by the following portion of the instruction.

Again, it is contended that this instruction is erroneous, in that "it tells the jury that they may consider the alleged fact of flight in arriving at a verdict after they have arrived at a verdict." But this criticism is not warranted. What the instruction does in effect say is that, if the jury are satisfied that the crime charged in the information has been committed by some one, then they may take into consideration any testimony showing, or tending to show, flight or concealment by the defendant, in determining whether the defendant is the party guilty of the offense; and this is correct. (*State v. Lucey*, 24 Mont. 295, 61 Pac. 994.)

The opening sentence of instruction No. 25 is as follows: "You are instructed by the court that one of the defenses interposed by the defendant in this case is what is known in law as an *alibi*, that is, that the defendant was at another place at the

time of the commission of the crime." Appellant contends that the jury would understand from this that the burden was cast upon the defendant to prove the *alibi*. But the instructions must be considered together; and, in view of instruction No. 23, which reads as follows: "The jury will bear in mind that the burden of proving that the defendant was present and participated in the alleged robbery is upon the prosecution, and, if the prosecution fails to prove the presence or participation in the alleged robbery beyond a reasonable doubt, then it is your duty to acquit the defendant"—it is impossible that the jury could have been misled. This same question was reviewed at length in *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026, and we coincide with the views therein expressed.

11. Complaint is made of the refusal of the court to give defendant's requested instructions 29, 32, and 33; but we think the subject matter of these instructions was fully covered by the instructions given.

12. Complaint is also made of the refusal of the court to give instruction No. 39, asked by the defendant, as follows: "You are instructed by the court that in this case there has been testimony given by police officers and detectives, and in weighing their testimony greater care should be used by the jury in relation to the testimony of persons who are interested in or employed to find evidence against the accused than in the case of other witnesses because of the natural and unavoidable tendency and bias of such persons to construe everything as evidence against the accused, and disregard everything which does not tend to support their preconceived opinions of the matter in which they are engaged." Such an instruction is erroneous under any possible theory of this or any other case. Our Code provides: "The jury, subject to the control of the court in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive," etc. (Code Civ. Proc., sec. 3390.) This statute is the law of the state; and, no matter what other courts may have decided, in the absence of like statutes, we are bound by these

provisions. It was the province of the jury to pass upon the weight of the evidence and the credibility of the witnesses, uninfluenced by any suggestion from the court as to the relative weight of the testimony of the different witnesses. There is not anything in our Code which would warrant the giving of such an instruction, while by an unbroken line of decisions, covering a period practically coextensive with the life of the territory and state, the giving of such an instruction has been held to be erroneous.

We do not concede that this proposed instruction is a correct statement of facts; but, in any event, it is a comment upon the weight of the evidence, and, if it had been given, the court would have invaded the province of the jury.

We find no reversible error in this record, and the judgment is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

IN RE FARRELL.

(No. 2,495.)

(Submitted November 22, 1907. Decided December 2, 1907.)

[92 Pac. 785.]

Habeas Corpus—Forgery—Information—Insufficiency—Jurors' Certificates—Duty of Clerk of District Court—Seal—Officers—Powers—Appeal.

Criminal Law—Information—Insufficiency—*Habeas Corpus*—Appeal.

1. If an information is not merely defective, but states facts which do not constitute any crime known to the law, or undertakes to state such an offense, but the facts do not constitute it, and no addition to them, however full and complete, can supply what is essential, the court is without jurisdiction to put the defendant on trial, and, if convicted, he is entitled to his release on *habeas corpus*, even though he might secure the same relief on appeal.

Same—Forgery—Instrument Without Apparent Legal Validity.

2. To constitute forgery, the instrument, alleged to have been forged, must be one which, if genuine, would have legal validity; hence, if an instrument, though falsely made, shows upon its face that it has no legal validity, it cannot be made the basis of a charge of forgery.

Officers—Limit of Powers.

3. The limit of the powers of a public officer, when acting in a ministerial capacity, is the statute conferring them, and such powers as are necessarily implied to effectuate those expressly conferred.

Same—Ministerial Duties—Statutes—Discretion.

4. Where the mode of performance of ministerial duties, expressly enjoined, is prescribed, no further power is implied, and the officer has no discretionary power with reference thereto, but must strictly pursue the statute.

Clerk of District Court—Seal—Mandatory Statutes.

5. The provisions of section 4645 of the Political Code, prescribing, among other things, that the clerk of the district court when issuing jurors' certificates, must impress his seal upon them, are mandatory, as are also those of section 4350, relative to how county moneys must be disbursed by the county treasurer.

Criminal Law—Forgery—Void Instrument—Seal—*Habeas Corpus*.

6. Complainant was convicted under an information charging that, while acting as deputy clerk of the district court, he forged a juror's certificate. The certificate did not bear the seal required by section 4645 of the Political Code. *Held*, on application for writ of *habeas corpus*, that, section 4645 being mandatory and not directory merely, the certificate in the absence of the seal did not constitute a legal liability against the county but was void on its face, that, therefore, a charge of forgery could not be predicated upon it, and that complainant was entitled to his release from custody.

ORIGINAL APPLICATION on behalf of William P. Farrell, convicted of the crime of forgery, for writ of *habeas corpus*. Complainant ordered released from custody.

Mr. Jesse B. Roote, Mr. Peter Breen, and Mr. A. C. McDaniel,
for Complainant.

The requirement found in section 4645 of the Political Code that the juror's certificate must be under seal is mandatory, and without the seal the certificate is void. Mandatory statutes are imperative; they must be strictly pursued; otherwise the proceeding which is taken ostensibly by virtue thereof will be void. Compliance therewith, substantially, is a condition precedent; that is, the validity of acts done under a mandatory statute depends upon a compliance with its requirements. (Sutherland on Statutory Construction, sec. 454; *Bingham*

County v. First Nat. Bank, 122 Fed. 16, 58 C. C. A. 332.) The special powers given to officers must be exercised with strict, substantial adherence to all directions of the statute. (Sutherland on Statutory Construction, sec. 456; *Raymond v. People*, 2 Colo. App. 329, 30 Pac. 504-508.) Where warrants on a county treasurer are required by statute to be sealed, no warrant is a genuine county warrant which is not so sealed. (*Smeltzer v. White*, 92 U. S. (2 Otto) 390, 23 L. Ed. 508; *Prescott v. Gonszer*, 34 Iowa, 178; *Springer v. Clay County*, 35 Iowa, 243; *Bingham County v. First Nat. Bank*, 122 Fed. 23, 58 C. C. A. 332. See, also, the following cases: *Lockwood v. Gehlert*, 127 N. Y. 241, 27 N. E. 812; *Reed v. Morse*, 51 Kan. 141, 32 Pac. 900; *Frankhouser v. Dewitt*, 9 Kan. App. 636, 58 Pac. 1027; *Gordon v. Bodwell*, 59 Kan. 51, 68 Am. St. Rep. 341, 51 Pac. 906; *Gates v. Brown*, 1 Wash. 470, 25 Pac. 914; *Hendrix v. Boggs*, 15 Neb. 469, 20 N. W. 28; *Sullivan v. Merri-man*, 16 Neb. 157, 20 N. W. 118; *Marshall S. Min. Co. v. Kirtley*, 8 Colo. 108, 5 Pac. 649; *Gates v. People*, 11 Colo. 292, 17 Pac. 783; *Reed v. Gates*, 11 Colo. 527, 19 Pac. 464; *State v. Smith*, 101 Mo. 174, 14 S. W. 108; *Reeve v. City of Oshkosh*, 33 Wis. 477; *Choate v. Spencer*, 13 Mont. 127, 40 Am. St. Rep. 425, 32 Pac. 651, 20 L. R. A. 424; *Kipp v. Burton*, 29 Mont. 99, 101 Am. St. Rep. 544, 74 Pac. 85, 63 L. R. A. 325.)

An instrument that is void on its face cannot be the subject of forgery. (*In re Tully*, 20 Fed. 812; *State v. Evans*, 15 Mont. 539, 48 Am. St. Rep. 701, 39 Pac. 850, 28 L. R. A. 127; *State v. Brett*, 16 Mont. 360, 40 Pac. 873; *Commonwealth v. Baldwin*, 11 Gray, 197, 71 Am. Dec. 703; *People v. Parker*, 114 Mich. 442, 72 N. W. 250; *State v. Peirce*, 8 Iowa, 231-235; *Rode v. State*, 5 Neb. 174, 25 Am. Rep. 475; *State v. Van Hart*, 17 N. J. L. 327; *People v. Heed*, 1 Idaho, 531; *State v. Wheeler*, 19 Minn. 98; 2 Bishop's Criminal Law, sec. 503; *Territory v. Delana*, 3 Okla. 573, 41 Pac. 618; *People v. Parker*, 114 Mich. 442, 72 N. W. 250.) Trial and sentence for an act which is not a crime are absolutely void, and a person under custody under such trial will be discharged on *habeas corpus*.

(*Ex parte Kearny*, 55 Cal. 212; *Matter of Maguire*, 57 Cal. 609, 40 Am. Rep. 125; *Ex parte Hollis*, 59 Cal. 407; *Ex parte McNulty*, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237; *Ex parte Maier*, 103 Cal. 479, 42 Am. St. Rep. 130, 37 Pac. 402.)

Mr. Albert J. Galen, Attorney General, and *Mr. John G. Brown*, Assistant Attorney General, for the State.

Under *State v. Brett*, 16 Mont. 360, 40 Pac. 873, and *In re Terrett*, 34 Mont. 325, 86 Pac. 266, the contention that to constitute forgery the juror's warrant must have been under the seal of the court, is not tenable. The absence of the seal does not deprive the juror of his right to hold the warrant as an evidence of indebtedness. The treasurer might refuse to pay it until such time as the holder supplied this deficiency, but, so far as the paper is concerned itself, it is an evidence of indebtedness, and possesses the same apparent legal efficacy. Possessing this, it is sufficient to make it the subject of forgery. (19 Cyc. 1379-1381.)

Even if the warrant failed in some of the details required, it was made by him with intent to defraud, and purports to have been made by an officer authorized to make it. (*State v. Tompkins*, 71 Mo. 616; *People v. Bibby*, 91 Cal. 470, 27 Pac. 781; *King v. State*, 43 Fla. 211, 31 South. 254.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On December 1, 1906, the complainant, having theretofore been tried and found guilty of forgery under each of two informations presented against him by the county attorney of Silver Bow county, was condemned to serve successive terms of fourteen years each, at hard labor in the state prison, the second term to begin at the expiration of the first. For execution of the judgments he was committed to the custody of the sheriff, who now detains him in the county jail pending appeals to this court, the presiding judge having certified that there is probable cause therefor. It is alleged that this de-

tention is illegal, in that the acts charged in the informations do not constitute forgery under the statute, and hence that the district court was without jurisdiction to try the complainant.

The informations were drawn under section 840 of the Penal Code, which provides: "Every person who with intent to defraud another falsely makes, alters, forges or counterfeits any charter, letters patent, deed, lease, indenture, etc., * * * or any auditor's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, etc., * * * is guilty of forgery."

At the time the alleged offenses occurred the complainant was chief deputy clerk of the district court. Following allegations of venue, etc., it is alleged in the first information that the said "William P. Farrell in his official capacity as such chief deputy clerk did willfully, unlawfully, feloniously, intentionally, fraudulently and knowingly make, forge, utter, pass, and publish as true and genuine to the treasurer of Silver Bow county, a public corporation existing under the laws of the state of Montana, a certain writing on paper and juror's certificate of the tenor and effect as follows, to wit:

"To the Treasurer of Silver Bow County, Montana.

"No. 3,065.

Butte, Montana, 3/22, 1905.

"I certify that the party named herein has served 19 days (57.00) as juror, and that he has traveled — miles for which you will pay to J. P. Sullivan — or order fifty seven & no/100 Dollars, the amount due him out of any money belonging to the General Fund.

"WILLIAM E. DAVIES,

"Clerk Second Judicial District Court.

"By W. P. FARRELL, Deputy.

"Presented and registered — 190 —.

"Not paid for want of funds.

"———, Treasurer.

"By ———, Deputy."

—which said juror's certificate and instrument in writing was then and there forged, fraudulent, false and counterfeited, and

the said defendant well knew the said juror's certificate and instrument in writing was fraudulent, false, and counterfeit," etc. The writing set forth in the second information is the same, except as to the number, date, amount, the name of the person to whom it purports to have been issued, and that it appears to have been assigned to one Danzer.

It will be observed that the writings referred to have not impressed upon them the seal of the court, and upon this fact the complainant bases the contention, made in this court, that they are void, and hence do not support a charge of forgery. If this contention can be maintained, the complainant is entitled to his release; for, as was said in *Ex parte Kearny*, 55 Cal. 212, at page 228: "This is not the case of a complaint inartificially drawn, which intimates the existence of the facts necessary to the constitution of the offense, or even of an attempted statement, insufficient, but indicating a purpose to declare on the essential facts. It is a total failure to allege any cause of action, and, however objectionable the conduct imputed to the petitioner, he is no more, in the eye of the law, charged by the complaint with any crime than if the paper had ascribed to him the most innocent of deeds."

If it were a case of a defective information only, it might well be contended, as the attorney general contends here, that the district court had jurisdiction, and that this court should require the complainant to seek relief through the medium of his appeals. But if an information states facts which do not constitute any crime known to the law, or undertakes to state such an offense, but the facts stated do not constitute the offense, and no addition to them, however full and complete, can supply what is essential, then the court is without jurisdiction to put the complainant on trial. In such case the judgment cannot be corrected. It is simply void. Imprisonment under execution thereon is illegal, and the complainant is entitled to his release, even though he might secure the same relief on appeal. (*State v. District Court*, 35 Mont. 321, 89 Pac. 63.)

This court in *State v. Evans*, 15 Mont. 539, 48 Am. St. Rep. 701, 39 Pac. 850, 28 L. R. A. 127, held that, to constitute forgery, the false instrument must be one which, if genuine, would have legal validity. This rule we find laid down by the authorities generally. (1 Wharton's Criminal Law, sec. 680; 2 Bishop's Criminal Law, secs. 523, 524.) If, therefore, an instrument be such that, though falsely made, it has no legal validity, and this is apparent from the face of it, it is not the subject of forgery. The attorney general does not controvert the correctness of this proposition, but insists that the writing set out in the information purports to be, and is on its face, a valid charge against the county of Silver Bow, which the treasurer can be compelled to pay, even though the complainant failed to impress upon it the seal of the district court. The solution of this question depends upon the proper construction of the following provisions of the Political Code:

"Sec. 4645. The clerk must give to each juror at the time he is excused from further service a certificate taken from a book containing a stub with a like designation, signed by himself under seal, in which must be stated the name of the juror, the number of days' attendance, the number of miles traveled and the amount due, and on presentation of such certificate to the county treasurer the amount specified in the certificate must be paid out of the general fund, and the clerk must make a detailed statement containing a list of the jurors, the amount of fees and mileage earned by each, and file the same with the clerk of the board of county commissioners on the first day of every regular meeting of the board, and no quarterly salary must be paid the clerk until such statement is filed. The board must examine such statement and see that it is correct. The clerk must keep a record of the attendance of jurors and compute the amount due for mileage, and the distance from any point to the county seat must be determined by the shortest traveled route."

"Sec. 4350. The county treasurer must: * * * 5. Disburse the county moneys only on county warrants issued by the

county clerk, based on orders of the board of county commissioners, or as otherwise provided by law."

Is section 4645 directory merely or mandatory? The same rule of construction applies to the one section as to the other. The first not only prescribes the duty of the clerk in the matter of keeping correct accounts of the attendance of jurors, their mileage, etc., but also prescribes the mode of their payment, and the evidence upon which it must be made. The second declares how the moneys of the county must be disbursed. Since the payment of jurors' fees, etc., is not made on county warrants issued in the regular way, the mode prescribed in section 4645, *supra*, is the mode "otherwise provided by law" for their payment. The use of the word "only" in section 4350 limits the power of the treasurer to pay out the money of the county, both as to the amount and the precedent conditions of payment. He must not pay it out at all except upon county warrants issued as directed, or, in case of jurors' fees, etc., upon a certificate issued by the clerk of the district court, as directed in section 4645. Section 4350 is therefore mandatory. So section 4645 is mandatory, both as to the duty of the clerk and of the treasurer; for the word "must" indicates that the duty of the clerk becomes imperative as soon as a juror is entitled to his pay. It also indicates that the duty of the treasurer is imperative as soon as a certificate, properly issued by the district court clerk, is presented to him. Since he cannot act at all until the proper demand is made upon him, and since the juror is entitled to his fees upon his discharge, it is certainly mandatory upon the clerk, not only to issue a certificate, but such a certificate as the law prescribes in order to effectuate payment to the juror.

The payment of jurors is thus lodged by the law in these two officers, without the intervention of any discretionary board or officer. The clerk ascertains and declares, under his hand and seal, that the precedent conditions of service have been fulfilled. Upon his certificate, duly executed, and upon this alone may payment be made. These officers act in this connection

entirely in a ministerial capacity. No discretion is lodged in them. In all such cases their authority is the command of the statute, and it is the limit of their power. The treasurer cannot act until the clerk has performed his duty. The clerk must, therefore, perform his duty in the way prescribed. If the latter issues false certificates, he violates his duty. If the former pays upon any other demand than that prescribed, he does the like.

It may be laid down as a general principle that the limit of the power of a public officer is the statute conferring the power, and what further power is necessarily implied in order to effectuate that which is expressly conferred. In the performance of ministerial duties expressly enjoined, however, when the mode of performance is prescribed, no further power is implied, nor has the officer any discretion. He must strictly pursue the statute. (Throop on Public Officers, sec. 556; Sutherland on Statutory Construction, secs. 454-456.)

These considerations, it seems to us, furnish ample ground for the conclusion that the certificates or orders in question are of no actual or apparent legal validity, and that, though the purpose of the complainant was to perpetrate a fraud by means of them, the making of them was not forgery.

The exact question here presented is a new one in this jurisdiction. This court, however, has considered analogous questions, and has held such statutes to be mandatory. In *Choate v. Spencer*, 13 Mont. 127, 40 Am. St. Rep. 425, 32 Pac. 651, 20 L. R. A. 424—an action to quiet title to certain real estate—the defendant claimed title under an execution sale. The execution had been issued upon a judgment entered on default. Summons in the case had been issued without the seal of the court. It was held that the summons—the jurisdictional writ—under the statute in this state requiring it to bear the seal of the court, was void because it did not bear the seal. In the later case of *Sharman v. Huot*, 20 Mont. 555, 63 Am. St. Rep. 645, 52 Pac. 558, the question involved was whether a summons issued without the signature of the clerk was void, or

voidable only, and, therefore, susceptible of amendment so as to support an attachment, the statute permitting the issuance of an attachment at the time of issuing the summons, or at any other time thereafter. It was held that the statute (Code Civ. Proc., sec. 632) prescribing the requirements of a summons is mandatory, and that, without the signature of the clerk, a fundamental part of the process—the summons—was void, and would not support the attachment. These cases, while not directly in point upon the facts here involved, are entirely so in principle. A summons is a jurisdictional writ. It is the only method by which the court can obtain jurisdiction of the defendant. Without it the court cannot lawfully and effectively proceed. So, here, the treasurer cannot act without the certificate of the clerk, and a certificate under his hand and seal, both the one and the other, is the only evidence upon which the treasurer may lawfully proceed.

It is true that in *Kipp v. Burton*, 29 Mont. 96, 101 Am. St. Rep. 544, 74 Pac. 85, 63 L. R. A. 325, it was ruled that an execution issued without the seal of the court was voidable only, and therefore amendable so as to support a sale of real estate thereunder. The theory of that case was that, the execution not being a jurisdictional writ but merely serving the purpose of carrying into effect the judgment in the case after the parties had had their day in court, the defect in it, caused by the omission of the clerk, fell within the purview of the statute providing for amendments (Code Civ. Proc., sec. 774); notwithstanding the language directing or requiring the execution to bear the impress of the seal is in terms mandatory. This case in nowise impairs the authority of *Choate v. Spencer* and *Sharman v. Huot*, *supra*. Any doubt as to the correctness in any of these decisions must attach to the case of *Kipp v. Burton* rather than to either of the others.

The courts of other states and the federal courts have frequently decided the same or analogous questions. In Iowa a statute provided that each county should have a seal. In prescribing the duties of the county treasurer it declared: "It

is the duty of the treasurer to receive all money payable to the county and to disburse the same on warrants drawn and signed by the clerk of the board of supervisors, and sealed with the county seal and not otherwise." In *Prescott v. Gonser*, 34 Iowa, 175, and in *Springer v. County of Clay*, 35 Iowa, 241, there was drawn in question the validity of certain county warrants of the county of Clay in that state, from which the impression of the county seal had been omitted. It was held that they were not a valid charge against the county, because the requirement of the statute had not been complied with in issuing them.

The charter of the city of St. Louis, Missouri, among other things, prohibited the auditor of the city from auditing any claim against the city unless presented "in proper and fully itemized form." An account for a gross sum for current expenses of the police department was presented to the auditor of the city, which he refused to audit and allow. On application for *mandamus*, to compel him to audit the account and issue a voucher, it was held that the provision of the charter was the limit of his authority to act, and that he could not be compelled to go beyond it. (*State ex rel. Francis v. Smith*, 89 Mo. 408, 14 S. W. 557.)

In *McCormick v. Bay City*, 23 Mich. 457, it was declared that the city treasurer was not entitled to credit for any moneys of the city paid out, except upon warrants regularly drawn in accordance with the provisions of the charter.

In *Reeve et al. v. City of Oshkosh*, 33 Wis. 477, it was declared that a provision of the charter of the city requiring all orders drawn upon the treasury to specify the purpose for which they were drawn was mandatory, and that orders drawn without a compliance with this requirement were not a valid charge against the city.

Bingham County v. First Nat. Bank, 122 Fed. 16, 58 C. C. A. 332, was an action brought by the bank against the county to recover a judgment on warrants issued by order of the commissioners of the county, which failed to distinctly specify on their face the liability for which they were drawn and when it

accrued. The statute (Idaho Rev. Stats. 1887, sec. 2006) requires this to be done. A recovery was had in the district court; but on error to the circuit court of appeals the statute was held to be mandatory, and that the warrants drawn in violation of it would not support an action against the county.

In *Raymond et al. v. People*, 2 Colo. App. 329, 30 Pac. 504, the defendants were convicted of forgery of a warrant of the city of Denver. The alleged forgery consisted in the alteration of a warrant drawn for \$3.50 so as to make it appear to have been drawn for \$303.50. The charter of the city provided that every warrant for the payment of money should show on its face the purpose for which it was drawn. The question was whether the fraudulent alteration of the warrant, not drawn in conformity with the charter requirements, was forgery. After a review of the authorities, the conclusion was announced that the warrant was void, and hence that a conviction for forgery could not be sustained. The court said that no duty or liability was created against the city of Denver by this warrant, not even to the extent of \$3.50; that no action at law would lie upon it; that no court of equity would enforce payment for it; and that no city treasurer would be obligated to recognize it, but, on the contrary, this officer was positively prohibited from paying it.

In *Smeltzer v. White*, 92 U. S. 390, 23 L. Ed. 508, the defendant in error had sued the plaintiff in error to recover upon a guaranty of county warrants issued by a county in Iowa, but without the county seal. The guaranty was to the effect that the warrants had been regularly issued and were genuine, and the contention was made that they were genuine, even though they did not bear the impress of the county seal. The court after referring to the statute of Iowa touching the duty of the auditor to issue warrants under seal, and prohibiting the treasurer to pay them unless so drawn, disposed of this contention by saying: "It is too clear, therefore, for debate, that the genuineness and regularity of issue of county warrants can exist only in cases when the warrants are sealed with the county

seal; and so it has been decided by the supreme court of Iowa substantially, both in *Prescott v. Gonser*, 34 Iowa, 178, and in *Springer v. County of Clay*, 35 Iowa, 243." The following cases are more or less directly in point: *Argenti v. City of San Francisco*, 16 Cal. 256; *Lockwood v. Gehlert*, 127 N. Y. 241, 27 N. E. 812; *Sullivan v. Merriam*, 16 Neb. 157, 20 N. W. 118; *Glidden v. Hopkins*, 47 Ill. 525; *Gates v. People*, 11 Colo. 292, 17 Pac. 783; *City of Leavenworth v. Rankin*, 2 Kan. 357; *Weaver v. Cherry*, 8 Ohio St. 565. No case announcing a contrary doctrine has been called to our attention. No distinction can be made between county or city warrants and certificates such as the clerk is required to issue under the statute.

Since the statute must be held to be mandatory, the result must necessarily follow that the certificates or orders for the alleged forgeries of which the complainant was convicted cannot be made the basis of legal liability against the county; and since they cannot be made the basis of legal liability, they must necessarily be of no legal effect, and therefore void. A charge of forgery, therefore, cannot be predicated upon one of them, otherwise in proper form, which does not bear the seal, though the recitals in it are wholly false.

The attorney general has cited the case of *In re Terrett*, 34 Mont. 325, 86 Pac. 266, and insists that this case falls within the principle of that case. There is, however, a clear distinction between the two. In the *Terrett Case* the instrument alleged to have been forged appeared upon its face to be genuine, and would have furnished a basis for a valid charge against the state, if the precedent conditions, which were falsely recited on the face of it, had been fulfilled. As a matter of fact they had not been fulfilled, and this court held that the making of these false recitals, in order to manufacture the instrument which was apparently the basis of a valid charge against the state, was forgery. In this case the certificate shows upon its face, by the absence of the impression of the seal of the district court, that it is of no validity whatever.

We are not here concerned with the question whether the complainant is chargeable with any other crime. In so far as his detention is sought to be justified by process issued upon the judgments sentencing him to punishment for forgery, he is entitled to his release. It is accordingly ordered that he be released from custody.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

HUGHES, APPELLANT, v. MULLINS, RESPONDENT.

(No. 2,456.)

(Submitted November 9, 1907. Decided December 2, 1907.)

[92 Pac. 758.]

Contracts—Illegality—Public Policy—Procurement of Testimony.

Contracts—Illegality—Procurement of Testimony—Public Policy.

1. A contract by the terms of which plaintiff in effect agreed, for a consideration of \$50,000, to furnish evidence which would enable defendant to either win two certain suits, or one of them, upon trial, or which would put the latter in such a position that he could force a favorable settlement of one or both of them, had a tendency to impede the due administration of justice and was, therefore, void as against the policy of the law.

Same—When not Severable.

2. Nor did a certain paragraph of the above contract constitute an independent agreement, not prohibited by law, when it provided that the knowledge plaintiff had of any testimony should be considered of sufficient value for the consideration of the "aforesaid sum of money" whether such testimony was used in court or not. Standing alone this portion of the contract was meaningless, while, if taken in connection with the remaining portion of it, it became plain. The agreement was not severable.

Same—When not Severable—Single Consideration.

3. The consideration for the contract set forth in the foregoing paragraph having been the lump sum of \$50,000, and not a portion of that amount for certain acts and another portion for other things done, the contract was not severable, under the rule that, where the consideration to be paid for the performance of a contract is single and entire, the contract itself will be held entire and not severable, even though the subject of it should consist of several distinct and independent items.

Appeal from District Court, Silver Bow County; Jno. B. McClernan, Judge.

ACTION by Elmer Hughes against Pat Mullins. Judgment for defendant, and plaintiff appeals. Affirmed.

Mr. John J. McHatton, for Appellant.

If it could be said that there was any contract contained in the writing which was questionable on the ground of public policy, the contract upon which the plaintiff relies, and which is included therein, is separate and divisible from the balance of the agreement, and constitutes a contract between the plaintiff and defendant, wherein, at the defendant's solicitation and request, the plaintiff agreed that he would assist the defendant to obtain knowledge of what the testimony would be, and that in consideration therefor, the defendant would pay him the sum of \$50,000, and that the plaintiff performed his part of the contract, and assisted the defendant in obtaining said knowledge, and procured said knowledge for him. This agreement was separate and distinct and free from any taint, and the same should be enforced under the general doctrine that it, being separate and distinct from any objectionable portion of the agreements contained in the writing, constitutes a separate and distinct contract which is enforceable. (*Jackson v. Shawl*, 29 Cal. 267; *Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770; *Granger v. Original Empire etc. Min. Co.*, 59 Cal. 678; *McVicker v. McKenzie*, 136 Cal. 660, 69 Pac. 495; 9 Cyc. 556, F, 564, par. 10, 569, par. 12.) It is held that where the illegality pertaining to a contract was unknown to the party performing, it does not vitiate the contract, and he is entitled to have the benefit thereof. (*Fox v. Rogers*, 171 Mass. 546, 50 N. E. 1041.) Mere knowledge of the intention to use a contract for illegal purposes does not prevent the party entering into it from enforcing it. (9 Cyc. 571, par. C.)

There is no rule of law or morals which would prevent a party entering into a contract for obtaining information.

The old rule of the common law with reference to matters of this kind has been very much modified. No better illustration can be called to attention than that with reference to champerty. Formerly all champertous contracts or agreements were void. An attorney could not, under the rule, agree to prosecute or defend an action when his compensation was dependent upon the result, or when he was to obtain a portion of the result as his compensation. Such is not the rule to-day. (*Ballard v. Carr*, 48 Cal. 74; *Davis v. Webber*, 66 Ark. 190, 74 Am. St. Rep. 81, 49 S. W. 822, 45 L. R. A. 196; *Richland County v. Millard*, 9 Ill. App. 396.) And we submit there is nothing in public policy which will prevent one person from employing another to obtain information with reference to existing facts upon an agreement to pay therefor. (*Wellington v. Kelly*, 84 N. Y. 543; *Chandler v. Mason*, 2 Vt. 193; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370; *Lucas v. Pico*, 55 Cal. 126; *Wood v. Casserleigh*, 30 Colo. 287, 97 Am. St. Rep. 138, 71 Pac. 360; *Harris v. More*, 70 Cal. 502, 11 Pac. 780.)

Mr. T. J. Walsh, and *Mr. John F. Davies*, for Respondent.

Citing on the question of divisibility of the contract in question: Note to *Huyett v. Chicago*, 59 Am. St. Rep. 277; *Nichols & Shepard Co. v. Charlebois*, 10 N. Dak. 446, 88 N. W. 80; *Forbes v. McDonald*, 54 Cal. 98; *Elliott v. Chamberlin*, 38 N. J. Eq. 604, 48 Am. Rep. 327; *Potsdamer v. Kruse*, 57 Minn. 193, 58 N. W. 983; *McVicker v. McKenzie*, 136 Cal. 656, 69 Pac. 495. The contract was against public policy. (*Quirk v. Mueller*, 14 Mont. 467, 43 Am. St. Rep. 647, 36 Pac. 1077, 25 L. R. A. 87; *Stanley v. Jones*, 7 Bing. 369; 9 Cyc. 500; *Goodrich v. Tenney*, 144 Ill. 422, 36 Am. St. Rep. 459, 33 N. E. 44, 19 L. R. A. 371; note to *Wood v. Casserleigh*, 97 Am. St. Rep. 138, 145; *Thomas v. Caulkett*, 57 Mich. 392, 24 N. W. 154; *Pollak v. Gregory*, 22 N. Y. Super. Ct. (9 Bosw.) 116; *Gillett v. Board*, 67 Ill. 256.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action on a contract to recover the sum of \$50,000. The amended complaint alleges that in 1902 the defendant herein, Mullins, commenced two certain actions in the district court of Silver Bow county against the Boston and Montana Consolidated Copper and Silver Mining Company, designated in the records of that court as 10,209 and 10,211. In the first of these Mullins claimed in his complaint, in effect, that at one time he had a lease upon the Comanche lode mining claim with an option to purchase the same; that the Boston and Montana company procured one C. M. Allen to obtain from Mullins an undivided one-fourth interest in his lease and bond, and to become an ostensible partner with Mullins in exploring and developing the claim; that the money paid by Allen for such interest was furnished by the Boston and Montana Company; that Allen was not acting for himself, but for that company; that Allen and the company knew the mineral condition of the claim, and knew that it was very valuable, all of which facts were unknown to Mullins; that Allen misrepresented the value to, and concealed the real value of the property from, Mullins, and discouraged him from further operations under the lease and bond, and finally induced Mullins to sell his interest to a representative of the Boston and Montana Company, without knowing that he was doing so, for \$7,500, the net amount which Mullins had expended upon the claim, while his interest was of very much greater value.

It is alleged that Mullins in his complaint had set forth at length the acts of fraud on the part of Allen and the company, which had resulted in Mullins parting with his interest in the lease and bond; that Mullins had prayed for an accounting for the value of ores extracted by the company, and that he be adjudged to be the owner of a three-fourths interest in the claim, and for a conveyance of such interest by the company. It is alleged that in the second of these suits Mullins had sought

to obtain a judgment for \$100,000 for ores extracted from the claim by the company during the time that Mullins and Allen were working the same under the lease and bond.

This amended complaint then alleges that it was material for Mullins to know whether Allen would testify in accordance with the allegations of his (Mullins') complaint in case 10,209; that Mullins did not know what information Allen possessed; "that the defendant [Mullins] applied to the said C. M. Allen and to this plaintiff for information regarding the matters upon which he desired to procure evidence; that said defendant was informed by said plaintiff that he could assist him in producing such testimony or evidence, and that he would do so, provided the defendant entered into the agreement with him hereinafter alleged to compensate him for his services which might be rendered in producing the same, or in giving the defendant, or in assisting the defendant to obtain, knowledge of what such testimony would be"; that on March 19, 1903, Hughes and Mullins entered into an agreement in writing, only one paragraph of which contract is set forth. It is alleged that, acting under this agreement, Hughes and Allen furnished to Mullins the information which he desired, and that but for the agreement by Mullins to pay the sum of \$50,000, he would not have obtained such information. It is then alleged that thereafter Mullins settled his suits for the sum of \$150,000, and that Hughes demanded payment of the \$50,000 mentioned in the contract, which demand was refused.

To this amended complaint a demurrer was interposed and overruled, and defendant Mullins then filed an answer, setting forth three separate defenses. This answer admits, by not denying, the commencement of the suits, against the Boston and Montana Company and the nature and character of the allegations in his complaints, but denies most of the other allegations of the amended complaint. It admits and alleges "that the defendant applied to the said C. M. Allen for information regarding the matters upon which he desired to present evidence at the trial of the actions brought by him against the said

Boston and Montana Consolidated Copper and Silver Mining Company, and avers the fact to be that prior to the time that he first saw, met, or had any business transactions whatever with the plaintiff the said C. M. Allen had given to the defendant information regarding the matters in relation to which he desired to submit evidence in the actions so instituted by him, the defendant, but defendant denies that he applied to the plaintiff for information regarding the said matters, and denies that the plaintiff had any information in relation to the same, or that the defendant ever imagined that he had."

With respect to the circumstances surrounding the execution of the contract of March 19, 1903, the answer states: "Denies that on or about the nineteenth day of March, 1903, or at any other time, the defendant did enter into with, execute, or deliver to the plaintiff any agreement in writing, except that on that day the plaintiff presented to the defendant an instrument in writing, of which a copy is hereto attached, marked 'Exhibit A,' and by this reference made a part of this answer, representing at the time to the defendant that he was the agent and representative of the said C. M. Allen, and that the said C. M. Allen would not testify at the trial of either of the actions begun by the defendant against the Boston and Montana Consolidated Copper and Silver Mining Company, or would not testify to the facts in said actions, or testify in such a manner in such actions as that his testimony would be of any service to the defendant herein, unless the defendant would sign the agreement so by him presented to this defendant, and that thereupon the defendant signed the same."

The answer specifically denies that Mullins would not have received the knowledge or information in support of the allegations of his complaints in his suits against the Boston and Montana Company, which it is alleged he did receive, but for the fact that he entered into the contract of March 19, 1903, and agreed to pay Hughes \$50,000. The answer denies that Mullins received \$150,000 in settlement of his suits, but admits that he received \$75,000.

For a second defense the answer sets forth at length the contract of March 19, 1903, designated "Exhibit A" above, as follows:

"Butte, Montana, March 19th, 1903.

"This agreement made and entered into this 19th day of March, A. D. 1903, by and between Patrick Mullins of Butte, Silver Bow Co., Mont., party of the first part, and Elmer Hughes of Missoula, Missoula Co., Mont., party of the second part,

"Witnesseth: That whereas the said first party now has pending in the courts of Montana certain mining suits affecting the Comanche mining claim, and whereas the said second party elects to furnish evidence in said suit or suits, it is hereby agreed: That in case evidence is produced that C. M. Allen, a party named in these suits was never the partner of the said party of the first part, but acted as agent for other parties in the working and sale of the lease and bond of the Comanche mine held by the party of the first part and that said C. M. Allen had full knowledge of the value of said Comanche mine, but concealed the same from said first party that he might so discourage said first party that he would turn over all his holdings in said Comanche mine to the parties that said C. M. Allen was representing, and that the said parties who were to receive said interests were fully conversant with all of these conditions and of the value of said Comanche mine. And this agreement witnesseth that if such testimony is produced that it will be conceded by said party of the first part that said second party has fulfilled his part of this agreement and it will not be incumbent upon said second party to prove that he produced it. And this agreement further witnesseth that in consideration of the faithful performance of the above named covenants by the said second party that said first party agrees to pay to the said second party the sum of fifty thousand (\$50,000) dollars, as soon as any settlement of any kind is made on this or any one of said Comanche lawsuits now pending in the county of Silver Bow wherein said testimony is used between party of the

first part and the parties now in possession of the Comanche mine. And it is agreed, when it can be shown that settlements have been made between party of the first part and the defendants in said Comanche mining cases that no further evidence will be required to render said first party fully liable for the payment of the full amount of money mentioned above.

"This agreement binds the heirs and assigns of both the first and second parties to a faithful performance of all matters herein specified.

"It is further agreed that the knowledge of what said testimony is to be is considered of sufficient value to party of the first part that he hereby agrees that in case of settlement of any of the cases as above mentioned that the aforesaid sum of money will be paid to said second party whether the aforesaid testimony is used in court or not.

"It is further agreed that in case any lawsuits are brought against the witness that said second party shall at the time specify as the witness meant in this clause by the defendants of the Comanche lawsuits said cases being brought as a result of said testimony then the party of the first part agrees to defend all such cases fully and without any expense to said second party or his witness.

"PAT MULLINS.

"ELMER HUGHES.

"Witness to both signatures:

"WM. J. JAMESON."

A reply was filed, which consists of the following admissions: "Admits that said defendant received some information from said C. M. Allen with reference to the matters alleged in the complaint and in the contract referred to in said complaint; but denies that he received all or full information with reference thereto, and alleges that information was furnished to him and he received the same, as in said complaint set forth, and plaintiff avers that any information which said defendant had with reference to the allegations of his complaint was hearsay, and not from witnesses or parties who knew the facts; admits

that said C. M. Allen was to receive from plaintiff, after he had received the same, in case he should receive it, a portion of the amount agreed by the defendant to be paid, after the same was paid, and to that extent was interested, and that, to that extent it might be said that he represented said C. M. Allen in said matter and in the matter of said contract"; and of a denial of every allegation of the third defense.

Defendant then interposed a motion for judgment on the pleadings, which was sustained and a judgment rendered and entered in favor of the defendant, dismissing plaintiff's action and awarding defendant his costs. From that judgment this appeal is prosecuted.

But one question is presented for solution: Is the contract of March 19, 1903, void? The instrument is so vague in its terms, and apparently adroitly drawn for the purpose of concealing the real intentions of the parties, to such an extent that its meaning is difficult of determination. But, taking into consideration the circumstances surrounding the making of the contract as disclosed by the allegations of the answer which are admitted or not denied in the reply, it would appear to mean that Hughes agreed to furnish evidence, through the medium of Allen as a witness, in support of the allegations of plaintiff's complaint in the suit of *Mullins v. Boston & Montana Co.*, No. 10,209, and, in consideration therefor, Mullins agreed to pay Hughes \$50,000 for the benefit of himself and Allen, contingent, however, upon a settlement of one or both of the suits, whether the evidence so furnished should be actually used in court or not; and further agreed that, in the event that any lawsuits should be brought by the Boston and Montana company against the witness, presumably Allen, whom Hughes should produce to give the desired evidence, by reason of such evidence being given, then Mullins would defend such suits without expense to Hughes or this veiled witness. In other words, Hughes contracted to furnish evidence which would produce one or the other of two results: (1) Win the suits, or one of them, upon trial; or (2) put Mullins in such a position that he could force a favorable

settlement of one or both of such suits. This is manifest from the fact that Mullins was not to become liable to pay anything until one or the other of these contingencies happened. That such a contract has a tendency to impede the due administration of justice, and is therefore void as against the policy of the law, was decided by this court in *Quirk v. Muller*, 14 Mont. 467, 43 Am. St. Rep. 647, 36 Pac. 1077, 25 L. R. A. 87; and we might well rest our decision upon the opinion in that case and the authorities cited. See, however, 9 Cyc. 500, where the later cases in harmony with the decision in *Quirk v. Muller* are collated. (See, also, note to *Wood v. Casserleigh*, 97 Am. St. Rep. 138, at page 145.)

But it is said that the written instrument of March 19, 1903, embraces independent contracts, or, rather, is severable, and that the portion quoted in plaintiff's amended complaint, to-wit: "It is further agreed that the knowledge of what said testimony is to be is considered of sufficient value to the party of the first part that he hereby agrees that in case of the settlement of any of the cases as above mentioned, that the aforesaid sum of money will be paid to said second party, whether the aforesaid testimony is used in court or not"—is a complete and independent contract, not prohibited by law and not against the policy of the law. But we are not able to agree with this contention. Standing alone, the part just quoted is meaningless; but, considered in connection with the remaining portions of the agreement, its meaning becomes plain, or at least as plain as any other portion of the contract or the contract as a whole. The paragraph was evidently intended to meet the second contingency mentioned above, and bind Mullins to pay in the event of a favorable settlement of either of his suits without trial. The portion of this contract intended to meet the first contingency above, or the favorable settlement after trial, in which the evidence to be furnished by Hughes should be used, is the following: "That said first party agrees to pay to the said second party the sum of fifty thousand (\$50,000) dollars as soon as any settlement of any kind is made on this or any one of

said Comanche lawsuits now pending in the county of Silver Bow *wherein said testimony is used* between party of the first part and the parties now in possession of the Comanche mine."

Furthermore, this contract is not severable. There is but one consideration to pass from Mullins for whatever acts or things Hughes might do. Hughes was to receive \$50,000 for whatever he did, not a portion of that sum for certain acts and another portion for different acts. We think a correct rule for determining whether a contract is entire or severable is announced in 2 Parsons on Contracts (eighth edition), page 517, as follows: "If the part to be performed by one party consists of several separate and distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. * * * And, if the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items." (*Huyett & Smith Co. v. Chicago Edison Co.*, 167 Ill. 233, 59 Am. St. Rep. 272, 47 N. E. 384.) Practically the same rule is announced in *Nichols & Shepard Co. v. Charlebois*, 10 N. Dak. 446, 88 N. W. 80, as follows: "Whether a contract is entire or severable depends, in general, upon the consideration to be paid, not upon its subject. If the consideration is single, the contract is entire; but, if the consideration is expressly or by necessary implication apportioned, the contract is severable. When the consideration is entire and single, the contract must be held to be entire, although the subjects may be distinct and independent items." And in this connection we call attention to section 2163 of our Civil Code, which reads as follows: "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void."

We think this contract is an entire contract and void, as against the policy of the law.

In conclusion we quote from the opinion in *Quirk v. Muller*, above: "We do not hold the contract void because it was an

agreement to procure perjury, or because it did procure perjury, but the contract had the tendency and opened the very strong temptation to the procurement of perjury."

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STATE EX REL. CONNORS, RELATOR, v. FOSTER, DEFENDANT.

(No. 2,496.)

(Submitted November 23, 1907. Decided December 2, 1907.)

[92 Pac. 761.]

Mandamus—Clerks of District Courts—Criminal Law—Appeal—Record—Supreme Court Rules.

Criminal Law—Appeal—Record—Clerk of District Court—*Mandamus.*

1. *Held*, on application for writ of mandate, that the clerk of the district court must, as soon as a notice of appeal in a criminal cause is filed with him, proceed to prepare a copy of the record and other papers enumerated in section 2281, Penal Code, and transmit same within ten days from the date of the notice, or, in case there be a bill of exceptions to be settled, then within ten days of the date of settlement, to the clerk of the supreme court without charge to appellant, and that a præcipe enumerating the papers constituting such technical record need not be lodged with the clerk.

Supreme Court Rules—Binding Upon Whom—Appeal.

2. The rules of the supreme court, when adopted under the limitations prescribed by section 111, Code of Civil Procedure, have the force of statutes, and are binding upon district courts and their officers in so far as such courts and officers have to do with appellate procedure.

Criminal Law—Appeal—Record—Rules of Supreme Court—Clerks of District Courts.

3. The copy of the record which the clerk of the district court is required, by section 2281, Penal Code, to prepare upon the filing of a notice of appeal in a criminal cause, and transmit to the clerk of the supreme court, must meet the requirements of Rule VI, subdivision 2, and Rule VII of the appellate court, relative to the preparation and arrangement of transcripts on appeal.

Same—Record on Appeal—Clerks of District Courts—Compensation.

4. *Quære*: Is the clerk of the district court entitled to compensation from his county for the performance of the duty imposed upon him by section 2281, Penal Code, and the Rules of the supreme court, to furnish a copy of the record on appeal in a criminal cause in proper form?

ORIGINAL APPLICATION by the state, on the relation of Daniel Connors, for *mandamus* to Fred H. Foster, clerk of the district court in and for Yellowstone county to compel such officer to prepare a copy of the record on appeal in a criminal cause free of charge to appellant. Peremptory writ granted.

Mr. C. A. Spaulding, for Relator.

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General for Defendant.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application for writ of *mandamus*. On December 5, 1906, the relator, having been convicted of the crime of rape, was by the judgment of the district court of Yellowstone county, wherein he was tried, sentenced to a term of five years in the state prison. He was at once committed to the prison, where he now is. On September 26, 1907, and within the time provided by law during which he might prosecute an appeal to this court, he perfected his appeal by causing his notice thereof to be filed with the defendant, the clerk of the district court for the county, and a copy thereof to be served on the county attorney. On the same day he caused a praecipe to be served upon and lodged with the defendant, directing him to prepare and certify a transcript of the record in the cause and enumerating the papers constituting said record. This the defendant refused to do unless the relator would pay him for the work of preparation. The district court denied a motion for an order directing the defendant to furnish the transcript. Thereupon application for relief was made to this court.

At the hearing upon the return of the alternative writ, the defendant made two contentions: (1) That, under the statute and the facts presented in the affidavit, he was not required to furnish a transcript without compensation from relator; and (2) that, though he should do so, it is not incumbent upon him to

furnish more than a certified copy of the record, and he may not be required to furnish a transcript suitable for filing in this court under the rules prescribing the form in which such transcripts must be prepared. There is no merit in either of these contentions. The statute prescribing the duty of the clerk in such case is the following: "Upon the appeal being taken, the clerk with whom the notice of appeal is filed must, within ten days thereafter, in case the bill of exceptions has been settled by the judge before the giving of said notice, but if not, then within ten days from the settlement of the bill of exceptions, without charge transmit to the clerk of the appellate court a copy of the notice of appeal, and of the record and of all bills of exceptions, instructions, and indorsements thereon; and, upon the receipt thereof, the clerk of the appellate court must file the same and perform the same services, as in civil cases, without charge." (Pen. Code, sec. 2281.)

It will be observed from an examination of this section that as soon as the notice of appeal is filed with the clerk and served upon the county attorney (Pen. Code, sec. 2275), it becomes the duty of the clerk to prepare a copy of the record and other papers enumerated, and transmit the same to the clerk of this court. This he must do within ten days from the date of the notice, or the date of the settlement of the bill of exceptions. There is no requirement that the appellant shall file a praecipe indicating his desire upon the subject. The filing and service of the notice makes this duty imperative, and the clerk must do so without charge; for the language is, "without charge transmit," etc.

But the defendant insists that he must do this only in cases where a bill of exceptions has been settled. It is clear, however, that the reference to the bill of exceptions is not to limit the duty required of the clerk, but to fix the time when the duty becomes imperative.

It cannot be gathered from the section that it was the intention of the legislature to permit a defendant to appeal without cost of a transcript, if he has had a bill of exceptions set-

tled, but may not do so if he wishes to present his case for review upon the technical record only. Such a construction of the provision would be absurd, and would in large measure defeat one of its main purposes, to-wit, to enable any defendant in a criminal case to appeal without payment of the cost of a transcript.

It is manifest, also, that the copy to be furnished by the clerk is to be used in this court for the purposes of the appeal; else the statute would not require it to be lodged with the clerk of this court, and require him to file it. The clerk must, therefore, not only prepare the transcript, but must put it in the form required by the rules of this court. (Rule VI, subd. 2, Rule VII, 30 Mont. xxix, 82 Pac. viii.) These rules, when adopted under the limitation prescribed by the statute (Code Civ. Proc., sec. 111), have the force of statutes and become binding upon the courts and litigants alike. (*State ex rel. Nissler v. Donlan*, 32 Mont. 256, 80 Pac. 244; *Montana Ore Pur. Co. v. Boston & Mont. Con. C. & S. Min. Co.*, 27 Mont. 288, 70 Pac. 1114.) Further, they are binding upon the district courts and their officers in so far as these courts and officers have to do with matters of appeal and appellate procedure. (*Montana Ore Pur. Co. v. Boston & Mont. Con. C. & S. Min. Co.*, 33 Mont. 400, 84 Pac. 706.)

While the rules cited do not in terms undertake to regulate the conduct of clerks of district courts, yet, in view of the fact that the duty involved here is prescribed by the statute, *supra*, it necessarily follows that the clerk must pursue the mode prescribed by them.

Whether the defendant is entitled to compensation from the county for the performance of the duty imposed upon him by the statute and the rules we do not decide, because it is not before us.

Let the peremptory writ issue.

Writ granted.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

CASES DETERMINED IN THE SUPREME COURT

AT THE
DECEMBER TERM, 1907.

THE HON. THEO. BRANTLY, Chief Justice.
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.
THE HON. HENRY C. SMITH, }

MCQUEENEY, RESPONDENT, v. TOOMEY ET AL., APPELLANTS.

(No. 2,457.)

(Submitted November 11, 1907. Decided December 4, 1907.)

[92 Pac. 561.]

Real Property—Execution Sales—Deficiency Judgment—Purchaser from Judgment Debtor—Title Acquired—Appeal—Pleadings—Complaint—Sufficiency.

Execution Sale—Action to Enjoin—Complaint—Sufficiency.

1. The complaint in an action to enjoin the levying of an execution issued upon a deficiency judgment, which alleged that an execution had been issued in a cause wherein one C. was defendant, that the sheriff levied upon and sold the property in controversy as the property of C. and that thereafter C., the judgment debtor, for value sold and conveyed the premises by a good and sufficient deed to plaintiff, sufficiently alleged the ownership of C., in the absence of a demurrer, assuming that such an allegation was necessary.

Real Property—Execution Sales—Purchaser from Judgment Debtor—Title Acquired—Liens—Deficiency Judgment.

2. *Held*, under section 1197, and sections 1233-1236, Code of Civil Procedure, that where real estate is sold under execution and bid in by the judgment creditor for less than the amount of his judgment, the judgment debtor may transfer the interest remaining in him, during the period of redemption, to a third person, who, upon redemption within the statutory time, acquires the legal title free from the lien of a deficiency judgment theretofore entered.

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Statutes—Adopted from Other States After Construction—Effect.

3. The legislature, by adopting statutes from another state after the same had been construed by its courts, adopts also the interpretation thus placed upon them.

Appeal from District Court, Silver Bow County; Jno. B. McClernan, Judge.

ACTION by John H. McQueeney against John Toomey and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Mr. John J. McHatton, and Mr. John G. Brown, for Appellants.

A redemption by a judgment debtor entitles the creditor to resell the land for any deficiency. (*State v. Sherill*, 34 Ind. 57; *Settlemyre v. Newsome*, 10 Or. 446; *Allen v. McGaughey*, 31 Ark. 253-260; *Bodine v. Moore*, 18 N. Y. 347; *Wood v. Colvin*, 5 Hill, 228.) The same rule applies to his successor in interest. (*Crosby v. Elkader Lodge*, 16 Iowa, 399; Rorer on Judicial Sales, secs. 955-959; *Titus v. Lewis*, 3 Barb. 70; *Rutherford v. Newman*, 8 Minn. 47, 82 Am. Dec. 122; *Warren v. Fish*, 7 Minn. 432; *Standish v. Vosberg*, 27 Minn. 175, 6 N. W. 489; *Green v. Stobo*, 118 Ind. 332, 20 N. E. 850; *Dray v. Dray*, 21 Or. 59-67, 27 Pac. 223; *Scaman v. Galligan*, 8 S. Dak. 277, 66 N. W. 458; *Bennett v. Bagley*, 22 Hun, 408; *Cauthorn v. Indianapolis etc. R. Co.*, 58 Ind. 14; *Stein v. Chambers*, 18 Iowa, 474, 87 Am. Dec. 411; *Phyfe v. Riley*, 15 Wend. 248, 30 Am. Dec. 55; *Davenport v. Karnes*, 70 Ill. 465; *Flanders v. Aumack*, 32 Or. 19, 67 Am. St. Rep. 504, 51 Pac. 447.) There can certainly be no distinction between a successor in interest of a judgment debtor, redeeming, and the debtor himself. Conveyance by the debtor would confer no greater right than he himself had. The successor in interest simply occupies the shoes of his predecessor, and can have no new or enlarged rights or privileges, and certainly cannot enjoy any that the judgment debtor did not possess, or could not have enjoyed, if he himself

had redeemed. The effect of the sale under the execution is simply to suspend rights, until a redemption has taken place.

Again, we desire to observe that there may be some difference in principle between the right of a party claiming under a mortgage foreclosure to a second execution and one claiming under a judgment. Where a party takes a mortgage as security, it might be held that, when he foreclosed and sold the property, he had received every right which he had bargained for, or which the other party had contracted to give him, and that any lien against that particular property or any claim of preference of payment out of it, had been satisfied to the full extent of the contract of the parties; whereas, a judgment creditor does not stand in contract relation with the judgment debtor. He has obtained a judgment to which he is entitled, under the law. There is no expressed or implied agreement that he shall confine his execution to a single sale of the property of the judgment debtor. He is entitled to a full satisfaction, and it would seem that the fact that he had obtained a partial satisfaction out of the judgment debtor's property would not bar him from levying a second or deficiency execution and obtaining full satisfaction. Certainly, under the authorities, he would have this right as against the judgment debtor. To hold that he would not, as against his successor in interest, would be to vary the law without there being a variance and distinction in principle; and it seems to us that this cannot be done without violence to correct principle and permitting the judgment debtor to practice a species of fraud upon his creditor.

Mr. John Lindsay, for Respondent.

When our legislature adopts a statute of another state, it is presumed to have adopted the construction which has been placed upon it by the courts of that state. (*Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *Largey v. Chapman*, 18 Mont. 563, 46 Pac. 808; *Price v. Lush*, 10 Mont. 68, 24 Pac. 749, 9 L. R. A. 467; *Murray v. Heinze*, 17 Mont. 353, 42 Pac.

1057, 43 Pac. 714; *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182; *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399.) And such construction is controlling on the courts of this state. (*Sharman v. Huot*, 20 Mont. 557, 63 Am. St. Rep. 645, 52 Pac. 558.)

The right of redemption is a right given by statute, and the decisions in the different states vary, in accordance with the different statutes. (Freeman on Executions, 2d ed., sec. 314.) And, in order to redeem, the statutes must be strictly followed by the party seeking to redeem, except that the purchaser or those acting for him may waive defects in redeeming. (Id., sec. 314.) The rule seems to be that if the property be sold under a judgment, for an amount insufficient to satisfy it, the lien of the judgment is removed from the property; so that the plaintiff cannot, unless he has some other lien, redeem from the purchaser. This is the rule where there are several liens, and the proceeds are to be applied according to the several priorities and the sale will leave some of the liens entirely unpaid. (Id., sec. 321; *Simpson v. Castle*, 52 Cal. 644.) The decision in the case last cited has been approved in the following cases: *Black v. Gerichten*, 58 Cal. 58; *Fish v. Fowlie*, 58 Cal. 375; *Hervey v. Krost*, 16 Ind. 276, 19 N. E. 125; *Horn v. Indianapolis Nat. Bank*, 125 Ind. 394, 21 Am. St. Rep. 231, 25 N. E. 558, 9 L. R. A. 676, and *Pollard v. Harlow*, 138 Cal. 392, 71 Pac. 454. See, also, *Hays v. Thode*, 18 Iowa, 51; *Clayton v. Ellis*, 50 Iowa, 590.

The Code of Civil Procedure, section 1234, provides that the judgment-debtor, or his successor in interest, may redeem. So that we find the successor in interest is a redemptioner. We must conclude, therefore, that when McQueeney, the plaintiff and respondent in this case, before the expiration of the time for redemption, purchased the lands from Conroy, the judgment debtor, he secured title thereto, divested of any lien by reason of the deficiency judgment against Conroy.

MR. JUSTICE SMITH delivered the opinion of the court.

The district court of Silver Bow county tried this cause without a jury, and made the following findings of fact and conclusions of law:

"FINDINGS OF FACT.

"In the above-entitled action, the court finds upon the testimony submitted the following facts:

"First. The court finds that an execution was duly issued out of the above-entitled court in a cause wherein the defendant in this action, John Toomey, was plaintiff, and one M. V. Conroy was defendant, which execution was delivered to John J. Quinn, sheriff of the county of Silver Bow, state of Montana, a defendant in this cause; and that, in pursuance of said execution, said sheriff levied upon and sold the property described in the complaint in this action as the property of said M. V. Conroy.

"Second. The court further finds that the plaintiff herein, John H. McQueeney, subsequent to the date of said sale, and prior to the expiration of the one year allowed by law within which redemption of the said property might be made, for a valuable consideration purchased from the said M. V. Conroy all his right, title, and interest in the property described in the complaint herein, and received a deed therefor, and that he is, at the time of this trial, and was since the 27th day of September, 1905 (the date of the purchase of said property), the owner of the whole of the said property.

"Third. The court further finds that on the 30th day of September, 1905, and within one year after the date of the purchase by him of said premises, plaintiff duly redeemed the same, by causing notice of redemption to be made and served on the said John J. Quinn, sheriff aforesaid, and on the county clerk of Silver Bow county, Mont., by which said notice plaintiff claimed the right of redemption; and on the same day plaintiff paid to the said sheriff the sum of \$392. And the court finds that the sum of \$392 was the amount due upon said sale

at said date, and the full amount due to effect redemption of said property.

"Fourth. The court further finds that on the 12th day of October, 1905, said sheriff issued his certificate of redemption to plaintiff, and that the same was duly filed in the office of the county recorder of said Silver Bow county, Mont.

"Fifth. The court further finds that, after the redemption by plaintiff of the said property, the said sheriff, upon the order of defendant, published and advertised a notice that the said property would be again sold, upon an execution for a deficiency judgment in the cause first mentioned, to-wit, John Toomey, plaintiff, v. M. V. Conroy, defendant, and that said John J. Quinn, sheriff, was at the time of the commencement of this suit about to resell the same.

"Sixth. The court further finds that the said property is all situate in the county of Silver Bow, state of Montana, and within the jurisdiction of this court, and that the redemption made by plaintiff was a full and complete redemption of the property from said sale.

"Seventh. The court further finds that, at the time of the trial of this cause, the judgment in the case of John Toomey v. M. V. Conroy, in favor of said Toomey, had been fully satisfied and receipted by the clerk of the district court.

"Eighth. The court further finds that, at the time of the issuance of the execution which this action is brought to enjoin, it was issued for a sum many times greater than the amount due from M. V. Conroy to John Toomey.

"Ninth. The court further finds that all the allegations of plaintiff's complaint are true.

"CONCLUSIONS OF LAW.

"From the foregoing facts, the court finds its conclusions of law as follows, to-wit:

"First. That when the property described in the complaint was redeemed from the execution sale on a judgment in favor of John Toomey, plaintiff, v. M. V. Conroy, defendant, by John

H. McQueeney, who had subsequent to the date of said execution sale purchased the interests of the judgment debtor, M. V. Conroy, said property was not then subject to levy and sale under an execution issued upon a deficiency judgment in the case of Toomey v. Conroy; and that, as appears from the record in this case, the property in controversy was that of John H. McQueeney and could not be subjected to execution upon a judgment in favor of John Toomey and against M. V. Conroy.

"Second. As a further conclusion, the court holds that, when an execution is issued upon a judgment, which execution is greatly in excess of the amount actually due upon the judgment, it is unconscionable and void, and the court finds that in this case said execution was unconscionable and void.

"Third. The court further concludes as a matter of law that the remedy by injunction is a proper remedy to be exercised by the court in this case, and that the plaintiff is entitled to a judgment against the defendants forever restraining and enjoining them from in any manner levying the execution in question herein, and forever restraining them from in any manner casting a cloud upon plaintiff's title to the property in controversy in this action by any process issued out of the court by virtue of the judgment in the case of John Toomey, plaintiff, v. M. V. Conroy, defendant; and it is ordered that a judgment so restraining defendants be issued herein."

A decree was entered in favor of the plaintiff in accordance with the conclusions of law. Defendants appeal from the judgment, and also from an order denying a new trial.

Appellants contend that the finding of the court below that, at the time of the trial, the judgment in the case of *Toomey v. Conroy* had been fully satisfied, is not justified by the evidence, but we do not find it necessary to decide that question.

It is also contended that the complaint does not state facts sufficient to constitute a cause of action, for the reason that it is not therein alleged that Conroy was the owner of the property levied upon and sold by the sheriff. It is true that the complaint does not allege, in set terms, that Conroy was the owner;

but, after describing the premises, the complaint does allege that Conroy, "for value, sold and conveyed by a good and sufficient deed the above-described premises and all thereof to the plaintiff herein, since which time plaintiff has been and now is the owner and entitled to possession of said described premises, and the whole thereof." It is also alleged that the sheriff levied upon the real estate described, as the property of Conroy, and sold the same to Toomey. There was no demurrer to the complaint, and the questions considered by the court below were only those involved in the findings of fact and conclusions of law *supra*. Assuming that such an allegation is necessary, we think the complaint was sufficient in the absence of a direct attack thereon in the district court.

The serious question involved,—which seems to be one of first impression in Montana,—is this: When real estate is sold under execution and bid in by the judgment creditor for less than the amount of his judgment, what is the nature of the judgment debtor's remaining interest in the property, during the period allowed by law for redemption, and can he transfer that interest, whatever it may be, to a third person, so that the latter, by redeeming from the execution sale, can get a legal title free from the lien of the deficiency judgment? The respondent maintains that he can, while the appellant contends that the deficiency judgment is a lien upon the property in the name of the third person, and that the creditor may resell the same in the same manner, and with the same legal effect, as though the debtor himself had redeemed.

Appellant has called our attention to the case of *Curtis v. Millard & Co.*, 14 Iowa, 128, 81 Am. Dec. 460, where the court said: "Under our statute the legal estate of a judgment debtor is not divested by a sale of his land under execution, until after the expiration of the period for redemption, and the title has vested in the purchaser by deed from the sheriff. Prior to the delivery of such deed (which cannot be made until after the time for redemption runs out), the legal estate, the possession and usufruct, all remain with the execution debtor, and is an

interest of value, or such an estate as may be the subject of a lien, or of a sale under an execution, or of a conveyance by deed from the debtor. If, during the interim between the date of the sale and the delivery of the sheriff's deed to the purchaser, other judgments are rendered against the debtor, it has been repeatedly held that they attach as liens upon the debtor's interest, which is one of real value, consisting not only of the legal estate, rents, and profits, but the consequent right to discharge the lien and make his estate absolute. If, under such circumstances, the debtor should sell his right and interest in the premises, the purchaser would take it subject to all the liens and encumbrances that existed upon the same in the hands of the vendor. Now, the courts have frequently declared that the purchaser of lands sold on execution acquires by his purchase no more than a lien upon the lands for the amount of his bid. He acquires no right or estate upon which he could maintain ejectment, or which could be levied upon and sold for his debts. It is simply an inchoate or conditional right to an estate, liable to be defeated any time within one year by the payment of the purchase money and interest."

It will be seen that the conclusion of the Iowa court seems to rest upon the proposition that, under the Iowa statute, after a sale upon execution, the legal title remained in the judgment debtor, and that therefore the lien of a deficiency judgment attached to that legal title.

But, in the case of *Simpson v. Castle*, 52 Cal. 644, cited by respondent, this state of facts obtained: One Post, being the owner of certain lands, made a mortgage thereon to the defendant Castle, to secure the payment of a debt due from the former to the latter. The mortgage was foreclosed in the usual form, and at the sale of the mortgaged premises under the decree Castle became the purchaser for a sum less than the amount of the judgment, and received the usual certificate of sale. Thereupon the deficiency was reported by the sheriff, and a judgment therefor was duly docketed. Afterward, before redemption, and before the time for redemption had expired, the

mortgagor (Post) conveyed the premises to the plaintiff (Simpson), who, as the successor in interest of Post, paid to the sheriff the sum necessary to effect a redemption, which sum was accepted by the sheriff with the consent of Castle, to whom the redemption money was then paid, and thereupon the sheriff delivered to the plaintiff a certificate of redemption in due form. After the redemption was thus completed, Castle sued out an execution on the judgment for the deficiency, and the sheriff, under the direction of Castle, levied the execution on the same premises and was about to sell them under the execution. The action was brought to enjoin the sale.

The California court in its decision first notices the Practice Act of 1851, section 231, which provided that the judgment debtor, or a redemptioner, might redeem within six months on paying to the purchaser the amount of his purchase, with eighteen per cent thereon, together with any assessments or taxes which may have been paid by the purchaser, with interest, "and if the purchaser be also a creditor, having a lien prior to that of the redemptioner, the amount of such lien with interest." The court then reviews the case of *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655, where it was held that if real estate which is subject to a lien be sold under execution to the judgment creditor for a sum less than the whole amount of the judgment, he (the judgment creditor) still continued to be "a creditor having a lien" for the unsatisfied portion of the judgment upon the property sold under the execution; and that neither the judgment debtor nor a redemptioner with a subsequent lien could redeem without first paying the judgment. The court then says that at the next session of the California legislature the Practice Act of 1851 was amended, by adding thereto a clause that, "after the sale of any real estate, the judgment under which such sale was had shall cease to be a lien on such real estate."

We find, therefore, that in order to abrogate the rule laid down in *McMillan v. Richards*, *supra*, the legislature of California expressly provided that, after the sale of any real estate, the judg-

ment under which such sale was had should cease to be a lien on such real estate. But the law was again amended in 1860, by substituting for the words last above quoted a provision to the effect that in order to effect a redemption, "if the purchaser be also a creditor having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made," the amount of such lien, with interest thereon, shall also be paid.

The California court then says: "At the same time section 232 (of the Practice Act of 1851) was amended, and, as amended, provides that in redeeming from a redemptioner, and in the payment of prior liens held by him, 'the judgment under which the property was sold need not be so paid as a lien.' From this history of the decisions and legislation on the point under discussion, it is manifest that the amendment of 1859 unequivocally abrogated the rule laid down in *McMillan v. Richards*; and we think it is equally clear that the amendment of 1860 was only intended to modify the rule prescribed by the amendment of 1859, and not to restore that announced in *McMillan v. Richards*. On the contrary, the opposite intent is apparent. It was probably foreseen that under the broad language of the amendment of 1859 it might be claimed that, even though the property was redeemed by the judgment debtor, it would not thereafter be subject to the lien of the unsatisfied portion of the judgment. To obviate this result, the amendment of 1860, instead of retaining the provision that the lien of the judgment should cease absolutely after the sale, modified the rule by providing that the judgment debtor or a redemptioner may redeem by paying the amount of the purchase, with two per cent per month interest, together with any taxes or assessments paid by the purchaser; 'and if the purchaser be also a creditor having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien, with interest.' "

The Montana Code (Code Civ. Proc., sec. 1234) provides: "Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the

manner hereinafter provided, by the following persons, or their successors in interest:

“(1) The judgment debtor, or his successor in interest, in the whole or any part of the property.

“(2) A creditor having a lien by a judgment, mortgage or attachment, on the property sold, or on some share or part thereof, subsequent to that on which the property is sold. If a corporation be such creditor, or any stockholder thereof may redeem, in case the officers of such corporations refuse so to do. The persons mentioned in the second subdivision of this section are, in this Chapter, termed redemptioners.”

Section 1235 provides: “The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within one year after the sale, on paying the purchaser the amount of his purchase, with one per cent per month thereon in addition up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount, and if the purchaser be also a creditor having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest.”

Section 1236 provides: “If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner on paying the sum paid on such last redemption, with two per cent thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition the amount of any liens held by said last redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as the redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with two per cent thereon in addition, and the amount of any assessment or taxes which the last

previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest.

“Written notice of redemption must be given to the sheriff, and a duplicate filed with the county clerk, and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any liens other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff, and filed with the county clerk, and if such notice be not filed the property may be redeemed without paying such tax, assessments or lien. If no redemption be made within one year after the sale, the purchaser or his assignee, is entitled to a conveyance; or, if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, and the last redemptioner or his assignee, is entitled to a sheriff's deed; but in all cases the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property. If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. Upon a redemption by a debtor, the person to whom the payment was made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the county clerk of the county in which the property is situated, and the county clerk must note the record thereof in the margin of the record of the certificate of sale.”

Sections 231 and 232 of the California Practice Act of 1851, amended as indicated in the opinion of the court in *Simpson v. Castle*, were afterward incorporated in the California Codes of 1873. Our Code provisions above noticed are, in substance, and almost word for word, like those of California which had been construed there before their adoption here, and we took

them with the interpretation placed upon them by the supreme court of California. In addition to this, we agree with the reasoning of the court in *Simpson v. Castle*, so far as heretofore referred to. It is true that the court in that case goes on to say: "But it is well settled in this state that after a sale of real estate under execution, or under a decree of foreclosure, the legal title remains in the judgment debtor or mortgagor while the time for redemption is running," and attempts to further justify its decision on that ground. With this last line of reasoning we do not agree, preferring, rather, to concur in the conclusion of the Iowa court on that branch of the case as based upon the Iowa statute.

But the California court was wrong in its second conclusion, for the reason that at the time the decision was rendered there was a statute in that state providing that a sale on execution vested in the purchaser the legal title to the property. This provision was overlooked by the court in *Simpson v. Castle*, as was afterward held in *Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 454, and *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. 653. Our Code provision is the same as that of California, and reads as follows: "Sec. 1233 (Code Civ. Proc.). Upon a sale of real property, the purchaser is substituted to and acquires the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years unexpired term, the sale is absolute. * * *"

We find, then, that the legal title leaves the judgment debtor and vests in the purchaser, subject, however, to the right of redemption.

The lien of a judgment duly docketed in the clerk's office is as follows: "From the time the judgment is docketed it becomes a lien upon all real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterward acquire, until the lien ceases." (Code Civ. Proc., sec. 1197.)

The execution sale transfers the legal title to the purchaser, leaving in the judgment debtor simply the right to redeem.

How can it be said that, after he has lost the legal title, the debtor is still the owner of the property? We are inclined to the opinion that he is more nearly in the position of one who has a right to repurchase the property on certain fixed and definite terms. Of course, if the debtor redeems, the effect of section 1236, *supra*, is to terminate the sale and restore the estate to him, whereupon any deficiency judgment would attach as a lien.

Appellant has cited the following cases, which we think we should notice. In the case of *Crosby v. Elkader Lodge*, 16 Iowa, 399, it was held that a judgment creditor has a lien upon the equitable interest of the judgment debtor in the real estate, and such interest may be levied upon and sold to satisfy the judgment. If we place our decision of this case upon the statutory construction adopted in *Simpson v. Castle* alone, this Iowa case has no application. But it may readily be distinguished from the case at bar by the statement that after the judgment debtor has lost all "his right, title, interest, and claim" in the property, he no longer has any title, either legal or equitable.

The cases of *Phyfe v. Riley*, 15 Wend. (N. Y.) 248, 30 Am. Dec. 55, *Titus v. Lewis*, 3 Barb. (N. Y.) 70, *Green v. Stobo*, 118 Ind. 332, 20 N. E. 850, *Warren v. Fish*, 7 Minn. 347 (Gil. 347), *Rutherford v. Newman*, 8 Minn. 28 (Gil. 28), 82 Am. Dec. 122, and *Standish v. Vosberg*, 27 Minn. 175, 6 N. W. 489, are founded upon statutes essentially different from ours. As was said by the court in *Warren v. Fish*, and substantially in *Standish v. Vosberg*, referring to the grantee of the judgment debtor: "He was the owner of the fee."

In some of the states from which the foregoing citations are taken it is provided that, when redemption is made by the defendant or his heirs, devisees, grantees, etc., the sale of the premises so redeemed, and the certificate of such sale, shall be null and void and the proceeding at an end. (See *Phyfe v. Riley, supra*.)

It will be noted that our Code specifically says: "If the debtor redeem, the effect of the sale is terminated and he is restored

to his estate." This language is significant, and we feel that we might almost base our decision upon it alone.

The decisions of the supreme court of Oregon, in *Dray v. Dray*, 21 Or. 59, 27 Pac. 223, and *Flanders v. Aumack*, 32 Or. 19, 67 Am. St. Rep. 504, 51 Pac. 447, are based squarely upon the proposition that, after an execution sale, the legal title remained in the debtor, by statute, until the delivery of a sheriff's deed. In the case of *Scaman v. Galligan*, 8 S. Dak. 277, 66 N. W. 458, the property was redeemed by the judgment debtor, and, in the light of a statute exactly like ours, the court said: "There would seem to be no valid reason why a judgment creditor, under whose execution a sale has been made for less than the amount of his judgment and which has been redeemed by the judgment debtor, should not have the right to issue a second execution, and sell the same property again after a redemption by such debtor."

Stein v. Chambless & Banford, 18 Iowa, 474, 87 Am. Dec. 411, is an Iowa case, resting upon *Curtis v. Millard & Co.*, *supra*, and the Iowa statutes. The case of *Davenport v. Karnes*, 70 Ill. 465, can best be understood by reference to *McLagan v. Brown*, 11 Ill. 519, where the court said: "In this state, at least, the principal estate continues in the judgment debtor after the sale on execution so long as the equity of redemption continues, and, indeed, until the sheriff's deed is executed."

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

IN RE WISNER.

(No. 2,492.)

(Submitted November 22, 1907. Decided December 16, 1907.)

[92 Pac. 958.]

Criminal Law—"Individual Bankers"—Receiving Deposits When Bank Insolvent—Penal Statutes—Construction—Habeas Corpus.**Statutory Construction—Headnotes—Chapter and Section Headings.**

1. In the construction of statutes, the meaning of which is in doubt, the headnotes, chapter and section headings may properly be examined.

Same—Statutes Adopted from Foreign States After Construction.

2. Where the statute of a foreign state has been construed by its courts prior to its adoption by the legislature of this state, the interpretation so placed upon it is also adopted.

Criminal Law—"Individual Bankers"—Receiving Deposits When Bank Insolvent—Void Statute—*Habeas Corpus*.

3. Complainant was convicted, under an information based upon section 986, Penal Code, for having received deposits as an "individual banker" when knowing that his bank was insolvent. The laws of this state make no provision for "individual" bankers, but do so for "private" bankers. Section 986, *supra*, appears to have been adopted from the state of New York after the courts of that state had construed the term "individual banker" to mean one other than a private banker, and after such term had acquired the fixed and definite meaning, in the law, of one who was authorized to do banking subject to the supervision of the banking law. *Held*, that the term "individual banker" does not mean a "private" banker, that, since under the laws of this state there is no such person as an individual banker, complainant was convicted of an offense not known to the Penal Code, that the judgment of conviction is void and complainant entitled to his release from custody as prayed in his application for writ of *habeas corpus*.

Penal Statutes—Construction—Doubt as to Meaning—How Resolved.

4. If, in construing a penal statute, the court should entertain a reasonable doubt as to its meaning, such doubt must be resolved in favor of the defendant attacking an information based upon the provisions of such statute.

Same.

5. While the construction of penal statutes should not be so strict as to defeat the plain intent of the legislature, it must give the words employed the sense in which they were obviously used; and if then the legislative intent cannot be given effect, the law must fall.

ORIGINAL APPLICATION by G. S. E. Wisner for writ of *habeas corpus*. Complainant ordered discharged.

Mr. W. B. Rodgers, and Mr. J. H. Duffy, for Complainant.

The criminal statutes cannot be extended to a case within the reason and mischief of the statutes, unless it is also both within the letter and the manifest intention thereof. (Lewis' Sutherland on Statutory Construction, secs. 521, 524; Bishop on Statutory Crimes, 3d ed., sec. 194; *Ex parte Kohler*, 74 Cal. 44, 15 Pac. 436; *People v. Tisdale*, 57 Cal. 106; *The Schooner Enterprise*, 1 Paine, 32, Fed. Cas. No. 4499; *Ex parte McNulty*, 77 Cal. 168, 11 Am. St. Rep. 257, 19 Pac. 237; *State v. Walsh*, 43 Minn. 444, 45 N. W. 721; *Ex parte Bailey*, 39 Fla. 734, 23 South. 553; *Hines v. Wilmington etc. Ry. Co.*, 95 N. C. 434, 59 Am. Rep. 250; *Western Union Tel. Co. v. Axtell*, 69 Ind. 99; *Cook v. State*, 26 Ind. App. 278, 59 N. E. 490; *State v. Cudahy Packing Co.*, 33 Mont. 190, 114 Am. St. Rep. 804, 82 Pac. 833.)

"Where a statute of a foreign jurisdiction, which had there received a settled judicial construction, is adopted, wholly or in part, and enacted as a law of the state adopting it, it is presumed that the construction previously put upon it is adopted with it, and it should be interpreted according to such construction. This rule applies equally to re-enacted statutes; and it is likewise applicable to single words or phrases borrowed from another enactment." (Black on Interpretation of Law, p. 159.) By a long line of decisions of this court, this rule has uniformly been given full force and effect. (*Territory v. Stears*, 2 Mont. 330; *Lindley v. Davis*, 6 Mont. 453, 13 Pac. 118; *First Nat. Bank v. Bell*, 8 Mont. 32-46, 19 Pac. 403; *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642. See, also, *Blaylock v. Incorporated Town of Muskogee*, 117 Fed. 125, 127, 54 C. C. A. 639; *Sanger v. Flow*, 48 Fed. 152, 1 C. C. A. 56; *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643; *City of Laporte v. Gamewell*, 146 Ind. 466, 58 Am. St. Rep. 359, 45 N. E. 588, 35 L. R. A. 686.)

The legislature did not intend to include private bankers in section 986, Penal Code. (See *State v. Kelsey*, 89 Mo. 623, 1 S. W. 838; *Daly Bank etc. v. Great Falls etc.*, 32 Mont. 298, 80 Pac. 252; *State v. Rumberg*, 86 Minn. 399, 90 N. W. 1055;

Standard Oil Co. v. Commonwealth, 119 Ky. 75, 82 S. W. 1020; *People v. Prillen*, 173 N. Y. 67, 65 N. E. 947; *Ex parte Bailey*, 39 Fla. 734, 23 South. 553; *State v. Walsh*, 43 Minn. 441, 45 N. W. 721; *State v. Krueger*, 134 Mo. 262, 35 S. W. 604; *State v. Wentler*, 76 Wis. 89, 44 N. W. 841; *Hogan v. Akin*, 181 Ill. 448, 55 N. E. 137; *Matthews v. Murphy* (Ky.), 63 S. W. 785; *Pool v. Simmons*, 134 Cal. 621, 66 Pac. 872; *Ritchey v. People*, 22 Colo. 251, 43 Pac. 1026; *People v. Taylor*, 96 Mich. 576, 56 N. W. 28, 21 L. R. A. 287; *State v. Gaster*, 45 La. Ann. 636, 12 South. 739; *Reiche v. Smythe*, 13 Wall. 162, 20 L. Ed. 566.)

The word "banks," as it appears in the section headnote, and the word "bank," as it appears in the section itself, clearly signify and comprehend only incorporated banks. (*State v. Kelsey*, 89 Mo. 623, 1 S. W. 838; *State v. Reid*, 125 Mo. 43, 28 S. W. 173; *Way v. Butterworth*, 106 Mass. 75; *Way v. Butterworth*, 108 Mass. 109; *Campbell's Exrs. v. Farmers' Bank of Kentucky*, 10 Ky. 154; *Commonwealth v. McKean Co.*, 200 Pa. St. 383, 49 Atl. 982; *People v. Doty*, 80 N. Y. 232.)

The word "association," as used in this section and other sections of this chapter, undoubtedly means a corporation or quasi corporation. (*State v. Taylor*, 7 S. Dak. 533, 64 N. W. 550; *Anderson's Law Dictionary*, 85; *People v. Doty*, 80 N. Y. 231.) The foregoing goes to strengthen the intention of the legislature, as clearly expressed in the section and chapter headings, not to include private persons, firms and copartnerships, but to actually exclude them from the operation of Chapter XI, which said intention not only conflicts with the intention which would be expressed by the phrase "individual banker," if that phrase means a "private banker," but is absolutely and squarely repugnant thereto.

Thus we find in the same law two conflicting and repugnant intentions. If the intention expressed by the phrase "individual banker" is given effect, it antagonizes and neutralizes the other intention. Both are therefore void on the ground that the legislature *uno flatu* has enacted a contradiction. The court has no authority to choose between these conflicting in-

tentions. It can only administer, not make, the law. So far, then, as these repugnant intentions come in conflict with each other, the law is simply void and inoperative. (*Hilburn v. St. Paul Ry. Co.*, 23 Mont. 229, 58 Pac. 551; *State v. Partlow*, 91 N. C. 550, 49 Am. Rep. 652; *In re Hendricks*, 60 Kan. 796, 57 Pac. 965; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 77 Am. St. Rep. 775, 776, 55 S. W. 627, 48 L. R. A. 265.)

To hold that the phrase "individual banker" means a private banker, would also result in making the law inoperative and void, because not uniform in its operation or application. "Individual" is essentially a differentiating word. It distinguishes one from a greater number. It is one entity; one distinct being; a single one. Members of firms and copartnerships engaged in the private business of banking would not be subject to the law. To be punishable, the person must bank alone. Such a law is not uniform in its application or operation, and therefore void. (*People v. Doty*, *supra*; *State v. Cudahy Packing Co.*, 33 Mont. 190, 114 Am. St. Rep. 804, 82 Pac. 833.)

If the court below had no jurisdiction of the pretended offense charged in the information, or there is no law by which the petitioner can be punished for the matters charged in the information, *habeas corpus* is a proper remedy, and the petitioner ought to be discharged. (*Ex parte Mirande*, 73 Cal. 365, 14 Pac. 888; *Ex parte McNulty*, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237; *Easton v. Iowa*, 188 U. S. 232, 23 Sup. Ct. 288, 47 L. Ed. 452; *In re Snow*, 120 U. S. 274, 7 Sup. Ct. 556, 30 L. Ed. 658; *Ex parte Clark*, 100 U. S. 399, 25 L. Ed. 715; *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717; *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *Hans Nielsen, Petitioner*, 131 U. S. 176, 6 Sup. Ct. 672, 33 L. Ed. 118; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *United States v. Rodgers*, 23 Fed. 658; *Elliott v. Peirsol*, 1 Pet. 328, 7 L. Ed. 164.)

Mr. Albert J. Galen, and *Mr. E. M. Hall*, for Respondent.

The term "individual" has been construed to include the following: Under a law providing that no abatement shall be

made on the taxes assessed to any individual until he shall have filed a list under oath, it was held that the term includes both individual persons and corporations. (*Otis Co. v. Inhabitants of Ware*, 74 Mass. 509.) "Individuals," as used in an act providing for an *ad valorem* tax of one per cent on all moneys loaned on interest by individuals, was held to include natural persons, foreign banks and corporations. (*Bank of United States v. State*, 20 Miss. 456.) Under a law providing that telegraph companies shall receive dispatches from an individual, the word "individual" was construed to be used in the sense of "person," and to embrace artificial or corporate persons, as well as natural. (*State v. Bell Tel. Co.*, 36 Ohio St. 296, 38 Am. Rep. 583. See, also, 4 Words and Phrases.) In the light of the above authorities, we submit that the word "individual," when defining a banker, is clearly broad enough to include a private person engaged in banking, or, in other words, to include "private banker." The courts do not seem to make any distinction between private and individual bankers, where such difference is not created by express statute. (*State ex rel. Jones v. Cook*, 174 Mo. 100, 73 S. W. 489; *State v. Newberry*, 71 N. J. L. 18, 58 Atl. 163; *State v. Arnold*, 140 Ind. 628, 38 N. E. 820.)

MR. JUSTICE SMITH delivered the opinion of the court.

Chapter XI, Title XIII, Penal Code of this state, bears the following chapter heading, so called: "Fraudulent Insolvencies by Corporations, and Other Frauds in Their Management." Section 986 of that chapter reads as follows: "Every officer, agent, teller or clerk of any bank, and every individual banker, teller or clerk of any individual banker, who receives any deposits, knowing that such bank or association or banker is insolvent, is guilty of a felony." The section heading, so called referring to section 986, is: "Receiving Deposits in Insolvent Banks."

The county attorney of Deer Lodge county filed in the district court of that county an information against the above-named

complainant, G. S. E. Wisner, basing said accusation upon section 986, just quoted. The information in its charging part reads thus: "G. S. E. Wisner, the defendant above named, is accused by John H. Tolan, county attorney of Deer Lodge county, state of Montana, by this information of the crime of receiving deposits, knowing individual banker to be insolvent, a felony, committed as follows: That the said G. S. E. Wisner, on or about the 3d day of August, 1906, at the county of Deer Lodge, state of Montana, did then and there unlawfully, willfully and feloniously receive and accept the sum of four hundred (\$400) dollars, as a cash deposit from Walter Reynolds, the said cash deposits being then and there lawful money of the United States and the property of the said Walter Reynolds; the said cash deposits mentioned aforesaid being then and there received and accepted by the said defendant for and on behalf of one M. J. FitzPatrick, and the said M. J. FitzPatrick, being then and there an individual banker, and the said defendant being then and there clerk and agent of the said M. J. FitzPatrick, the said defendant as clerk and agent of the said M. J. FitzPatrick receiving and accepting the deposits mentioned aforesaid, then and there knowing that the said M. J. FitzPatrick was then and there insolvent, and the said M. J. FitzPatrick being then and there insolvent, contrary to the form, force, and effect of the statute in such case made and provided and against the peace and dignity of the state of Montana."

The defendant was convicted and sentenced to the penitentiary. The sentence was stayed, however, pending an appeal to this court, by the trial court signing a certificate of probable cause for the appeal, and defendant is now in the custody of the sheriff of Deer Lodge county. He has filed his petition for a writ of *habeas corpus*, alleging that he is restrained of his liberty by the sheriff, illegally, for the reason that the judgment of his conviction is null and void, because the district court "had no jurisdiction of the pretended offense attempted to be charged in the information, and said information charges an offense unknown to the laws of the state of Montana."

It is argued by complainant's counsel that the only kind of banks known to, and authorized by, the laws of this state, are banks incorporated under the laws of the state and private banks, and that the only kind of bankers known to, and authorized by, the laws of the state, are those connected with incorporated banks and those known as private bankers; that "individual bankers" were at the time it is alleged this offense was committed, and are now, wholly unknown to, and unauthorized by, the laws of this state, and could not and did not exist in the state; that the term "individual banker" does not mean private banker.

Both California and Idaho have statutes almost identical with ours, but they have never been construed by the courts of those states. The term "individual banker" appears to have been first employed in the state of New York as far back as the year 1840, at least. (N. Y. Laws 1840, Chap. 363, p. 306.) In the case of *People v. Doty*, 80 N. Y. 225, decided in 1880, the court held that the term "individual banker," as used in the provisions of an Act of the New York legislature, passed in 1875, relating to savings banks, which declared it "not to be lawful for any bank, banking association, or individual banker to advertise or put forth a sign as a savings bank," applied only to one who had availed himself of the banking statutes of the state and had become empowered to do banking thereunder, and did not apply to a private banker who exercised in his business no more than the rights and privileges common to all.

In the case of *Perkins v. Smith*, 116 N. Y. 441, 23 N. E. 21, decided in 1889, the same court said: "Since the passage of Chapter 363, Laws 1840, the term 'individual banker' has been frequently used in our statutes and reports and has acquired a definite meaning. It denotes a person who, having complied with the statutory requirements, has received authority from the banking department to engage in the business of banking, subject to its inspection, supervision, and to the burdens imposed. Private bankers are persons or firms engaged in banking, without having any special privileges or authority from the state."

In the case of *Hall v. Baker*, 66 App. Div. 131, 72 N. Y. Supp. 965, the court said: "The distinction between an individual banker and a private banker is well known and recognized in all our statutes and by the decisions of the court."

The "individual banker," in his capacity as such, was a creature of the New York statute. He enjoyed certain privileges, as, for instance, the right to issue circulating notes under certain conditions; and he was subject to restrictions, as, among others, that he was compelled to make reports to the controller, by whom his books, papers, and accounts were subject to examination, and he was obliged to have a fixed place of business in some certain city or town. So well defined had the term "individual banker" become in the legal phraseology in the state of New York that the legislature of that state, in 1892, three years before the adoption of our Codes, passed a law embodying the definition in the following words: "The term, 'individual banker,' when so used, means a person who has complied with the requirements of law, and is authorized by the banking department to engage in the business of banking and is subject to the supervision of the superintendent of banks and the banking law." And in 1902 the Penal Code of that state was amended so as to make it a misdemeanor for any officer, agent, teller, or clerk of any bank, banking association, or savings bank, or any individual banker or agent, or any *private* banker or agent, to receive deposits knowing the bank, association, or banker to be insolvent. (Parker's New York Criminal and Penal Code, Annotated 1906, p. 238, sec. 601.)

It appears, therefore, that the term "individual banker" had a well-defined legal and technical meaning, both by judicial construction and statutory enactment, in the sister state of New York at the time our section 986, Penal Code, *supra*, was adopted; that the term "private banker" also had a popular meaning and a definite legal meaning other than that given to the term "individual banker."

But our laws do not provide for any such legal entity as an individual banker; whereas, it is a matter of common knowledge that we have private bankers and private banking copartnerships in this state, and did have prior to the adoption of the Codes in 1895. It is therefore contended by the attorney general that the legislature in adopting our Code, section 986, could not have intended to include therein a person unknown to our law, to-wit, an "individual banker" as known in New York, but must have used the words in their popular sense, as meaning one person banking alone, or a private banker. This, however, is not an unanswerable argument. In passing, it may be remarked that such an interpretation of the section would exclude from the operation thereof an association of private bankers doing business as copartners, because such persons would not be engaged as individuals, and, further, that the chapter in terms includes joint-stock associations, which latter were not provided for, in the Codes, at the time of their adoption. Montana is a comparatively young state, and we know that many of our statutes and Code provisions were taken from the laws of other commonwealths. Indeed, the effort was made to incorporate in our laws, so far as local conditions made it advisable, all of the best regulations relating to modern forms of government, as found in the statutes of the different states of the Union. It is not a violent or unreasonable presumption that the legislature, in adopting the Codes, intended to provide, so far as possible, laws that should be comprehensive in terms and not necessary of amendment in order to meet succeeding changes of condition as the state developed, and the provisions of particular statutes thereafter to be enacted. Courts have heretofore acted upon this presumption.

In the case of *Ritchey v. People*, 22 Colo. 251, 43 Pac. 1026, the court said: "The strongest argument against this conclusion arises from the fact that in this state we have never had corporal punishment in the sense in which it is herein defined, but this argument loses much of its force when we remember that many of our statutes were taken from states where the

great body of the law is essentially different." And the court held that the term "corporal punishment" in a statute meant punishment upon the body, such as whipping, rather than punishment of the body, such as imprisonment, despite the fact that there was no law of the state providing for punishment upon the body in any case.

But in this discussion we are, at most, dealing only with presumptions in order to arrive at the legislative intent, and we are of opinion that the intent may best be ascertained by reference to other provisions of the chapter in which section 986 is found.

After an inspection of the report of the Code Commission, submitted to the legislature with the draft of the Codes of 1895, we are unable to say conclusively that our law was taken from the statute of New York. The same law, substantially, is upon the statute books of California, where neither the legislature nor the courts have ever defined the term "individual banker."

We are, then, to judge, if we can, whether our legislature intended to adopt the interpretation placed upon the words in New York. In the first place, we find that the chapter number of the New York statute is the same as our own: Chapter XI; the chapter headings are the same: "Fraudulent Insolvencies by Corporations and Other Frauds in Their Management." The section headings, or references to the sections following, are in some instances identical, as, for instance, section 591 (New York): "Fraudulent Issue of Stock, Scrip," etc., is the same as our section 981; and section heading 594 (New York) is the same as our section heading 984. These headings are significant.

In the case of *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29, this court said: "We are unable to determine whether (these) Code provisions were taken from the Code of California or from the Code of one of the Dakotas. * * * It is worthy of note, in passing, that the arrangement of the respective Codes of all these states is precisely the same. * * * This division of the Code into Divisions, Parts, Titles, Chapters, Articles and sections, is one of the instrumentalities by which the Code may be construed, and the particular title of each of these subdivi-

sions, which was arranged in the bill and adopted as a part of the Code itself, may be referred to and considered in determining the meaning of each subdivision. It is an elementary principle of statutory construction that all sections upon the same subject matter are to be taken as one law and construed together."

In *People v. Molineux*, 53 Barb. 15, the supreme court of New York said: "The inscription to Chapter 5 is not in any sense a title to a statute. It forms a part of the body of the Act quite as much as the section cited, and it was inserted for the purpose of controlling and limiting the scope and application of the general words used in the chapter." (See, also, *Barnes v. Jones*, 51 Cal. 303; *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345.)

"These headnotes are a portion of the statute, and may be examined for the purpose of determining the particular intent of the legislature with regard to the chapters in which they are placed." (*Keyes v. Cyrus*, 100 Cal. 322, 38 Am. St. Rep. 296, 34 Pac. 722.)

Examining, then, these so-called headnotes or chapter headings, as we may and should do, we find that Chapter XI by its heading refers solely to the management of *corporations*, and a reading of all of the sections of this Chapter (excluding for the moment section 986) discloses the fact that all of the sections refer to the management of corporations, joint-stock associations, and railroad companies.

In the case of *State v. Kelsey*, 89 Mo. 623, 1 S. W. 838, it was held that, under the Missouri statute declaring that "if any president, director, manager, cashier or other officer of any banking institution shall receive a deposit after he has knowledge that the bank is insolvent, he shall be guilty of larceny," the words "banking institution" meant an incorporated bank. Section 990 of our Penal Code refers to "every officer, agent or stockholder of any railroad company." The supreme court of Missouri, in the case last cited, said: "Can it be pretended that any other than an incorporated railroad company was intended by the use of the words 'any railroad company'? We think

not." (See, also, *State v. Reid*, 125 Mo. 43, 28 S. W. 172; *Daly Bank & Trust Co. v. Great Falls St. Ry. Co.*, 32 Mont. 298, 80 Pac. 252.) In the case of *Way v. Butterworth*, 108 Mass. 509, it was held that the office of a private banker was not a bank within the terms of a note made payable at "any bank in Boston."

We conclude, therefore, that Chapter XI was intended to, and does, refer only to frauds in the management of corporations and joint-stock companies. These latter have many characteristics of a corporation, and it has been said that it may not be improper to call such an association a quasi corporation. (23 Cyc. 467.).

When we reflect that in the state of New York these so-called "individual bankers," so far as the conduct of their business was concerned, were subject to many of the same restrictions as those placed upon banking corporations, we discover the reason for including such persons in the penal statute of that state. Indeed, it was there held at one time that an "individual banker" was a corporation sole. (*Bank of Havana v. Wickham*, 16 How. Pr. 97.)

We have found that the phrase "individual banker" had a well-defined, technical, and legal meaning in the state of New York at the time of the adoption of our Codes, and that it did not have the popular meaning conveyed by the term "private banker." Paragraph 16, of section 7, Penal Code, reads as follows: "Words and phrases must be construed according to the context and the approved usage of the language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning." In the case of *Perkins v. Smith*, *supra*, the court used this language: "Words having a precise and well-settled meaning in the jurisprudence of a country are to be understood in the same sense when used in statutes, unless a different meaning is unmistakably intended."

The supreme court of Alabama, in *Bragg v. State*, 134 Ala. 165, 32 South. 767, 58 L. R. A. 925, quotes with approval this language from Endlich's work on the Interpretation of Stat-

utes, page 94: "The words of a statute are to be understood in the sense in which they best harmonize with the subject of the enactment, and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained. That is, in the construction of a statute, * * * words are to be understood not according to their mere ordinary general meanings, but according to their ordinary meaning as applied to the subject matter with regard to which they are used. * * * But the rule giving to a word its technical meaning holds equally good in the construction of statutes dealing with other subjects as to which words and phrases used in a statute have acquired such a meaning, whether it be a legal, technical meaning or not; i. e., whether it be a technical meaning which the word or phrase has acquired in the law, or a technical meaning which it has acquired in any other science, art, or business, if the enactment relate to any of these, the technical meaning the word has in the law, in any other science, in any art, or in any business, is to be given it, according as one or the other is the subject of the enactment."

The supreme court of Colorado, in *In re Internal Improvement Fund*, 24 Colo. 247, 48 Pac. 808, said: "The Enabling Act does not specify what kind of improvements shall be considered internal improvements; hence we must consider the sense in which these words are used in American legislation. Therefore, if they have by common legislative usage and judicial construction acquired a fixed historical meaning, such meaning must control, rather than the etymological definition of the words themselves." (See, also, 2 Lewis' Sutherland on Statutory Construction, sec. 398.)

In *United States v. Jones*, 3 Wash. C. C. 209, 26 Fed. Cas. 653, the court said: "If a statute of the United States uses a technical term, which is known, and its meaning fully ascertained by the common or civil law, from one or the other of which it is obviously borrowed, no doubt can exist that it is necessary to

refer to the source from which it is taken for its precise meaning."

Again, as we find the same statute, with the exception of the designation of the degree of the offense, in the state of New York prior to its adoption here, it may be presumed that we adopted it from that state, together with the construction placed upon it by the courts of that state. The supreme court of the United States, in *Coulan v. Doull*, 133 U. S. 216, 10 Sup. Ct. 253, 33 L. Ed. 596, referring to a statute first adopted in Massachusetts, then in California, and later in Utah, said this: "The rule ordinarily followed in construing statutes is to adopt the construction of the courts of the country by whose legislature the statute was originally adopted." As to the second proposition above stated, we have abundant authority in the decisions of our own court. (See *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642; *McQueeney v. Toomey*, ante, p. 282, 92 Pac. 561.)

For the reasons, then, that the term "individual banker" was used in a statute of New York, and as so used had been interpreted by the courts of that state as meaning one other than a private banker, prior to the adoption of our Codes, that the term had acquired a fixed and definite meaning in the law other than its etymological definition prior to that time, that in its use in our Penal Code it is found in a chapter devoted entirely to acts and omissions of officers and agents of corporations and quasi corporations, that we have no such person in this state as an "individual banker," we are of opinion that the term as used in section 986 does not mean "private banker," and that the defendant was convicted of an offense unknown to our laws.

Had we any reasonable doubt as to the correctness of the foregoing conclusions, it would be our duty to resolve the same in favor of the innocence of the defendant on this particular charge. (*Cook v. State*, 26 Ind. App. 278, 59 N. E. 489; *The Enterprise*, 1 Paine, 32, 8 Fed. Cas. 732.) See *State v. Cudahy Packing Co.*, 33 Mont. at p. 190, 114 Am. St. Rep. 804, 82 Pac. 833, as to how penal statutes must be construed.

As was done in New York, it will be necessary for our legislature to amend section 986, if it is desired to include within its provisions the private banker. It was well said in *People v. Doty, supra*, "The lawmaker needs to take one step further to lay hold of such a wrongdoer. The courts cannot stretch a penal statute by construction so as to ensnare him."

It follows that the judgment of conviction complained of is void, and that complainant must be discharged from custody thereunder, and it is so ordered.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

ANDERSON, RESPONDENT, v. RED METAL MINING CO. ET AL., DEFENDANTS; PARIS BROS., APPELLANTS.

(No. 2458.)

(Submitted December 5, 1907. Decided December 16, 1907.)

[93 Pac. 44.]

Interpleader—Actions—Mistake in Form—Justices of the Peace—Jurisdiction—Appeal—Waiver—Notice—Adverse Party—Demurrer—Evidence—Harmless Error—Presumptions—Interest.

Actions—Mistake in Form—Relief—Immateriality.

1. Since, under section 28, Article VIII, Constitution, there is but one form of action in this state and law and equity may be administered in the same case, a mistake as to the form in which an action is brought or as to the relief demanded upon the statement of facts made, is of no moment.

Justices of the Peace—Jurisdiction—Appeal—District Courts.

2. Merely because plaintiff, in an action before a justice of the peace, assumed by the recitals in his complaint to secure the cancellation of an alleged forged assignment, and also a judgment on a contract for the payment of money, whereas the justice had not jurisdiction to grant the equitable relief asked, was no reason why his appeal to the district court should have been dismissed for lack of jurisdiction to entertain it, where, after eliminating the equity feature of the complaint (a demurrer to which, interposed by one of the defendants, had been sustained by the justice), it still stated a

cause of action of which the justice had jurisdiction; and, hence, the district court had power to proceed.

Same—Interpleader—Effect on Action—Jurisdiction.

3. Where, in an action by an assignee on an account, a justice of the peace permitted the defendant to pay into court the amount sued for, and thereupon substituted as defendants the assignor, and one other who claimed to be entitled to the money, the order of substitution did not convert the purely legal cause of action into an equitable one so as to deprive the justice of jurisdiction of the action, since section 588, Code of Civil Procedure, providing for interpleader, covers the subject both at law and in equity.

Interpleader—Irregularity—Waiver.

4. Section 588, Code of Civil Procedure, provides, *inter alia*, that a party against whom an action upon a contract, etc., is pending, may, before answer, upon affidavit, ask that another person claiming an interest in the subject matter of the action, be substituted in his place etc. An application for such a substitution was made on an amended answer. The party substituted became defendant without objection. *Held*, that the irregularity in the mode of substitution was waived by defendant.

Appeal—Transfer of Cause—Notice—"Adverse Party."

5. Under Code of Civil Procedure, section 1760, providing that, when an appeal is taken a notice thereof must be served on the adverse party, etc., an adverse party is one who has an interest in opposing the object sought to be accomplished by the appeal.

Same.

6. Where in an action before a justice of the peace, brought by an assignee on an account, the debtor interpleaded, besides one other, the assignor, who admitted the assignment and disclaimed any interest in the subject matter of the controversy, the latter was not an adverse party, within the meaning of section 1760, Code of Civil Procedure, upon whom it was necessary to serve notice of an appeal to the district court.

Justices of the Peace—Appeal—Demurrer.

7. In the action set out in paragraph 2 above, the justice of the peace sustained the demurrer of one of the defendants on the ground that the complaint, as against him, asked for equitable relief and thus, virtually, dismissed him from the case. This defendant was subsequently interpleaded by the original defendant, who paid the amount in controversy into court and asked that plaintiff and the substituted defendant be required to submit their claims to the money for determination. When the order of substitution was made, no objection was made by the interpleaded defendant that the complaint did not tender an issue upon the question of right between him and plaintiff. The defendant had judgment and plaintiff appealed to the district court. Here the defendant again interposed the demurrer which had been sustained by the justice of the peace. This was overruled. *Held*, that the action of the district court in overruling the demurrer was correct.

Appeal—Admissibility of Evidence—Harmless Error.

8. Error in admitting evidence on the question of consideration in support of the assignment of the account at issue in the action referred to above, when no such question had been made in the case, was harmless, where appellant offered no evidence but rested his case entirely upon his objection to the jurisdiction of the court, which was properly overruled, and where the court was justified in directing a verdict for plaintiff on the written assignment alone.

Interpleader—Payment into Court—Presumptions.

9. Where the defendant in an action on an account had paid the sum in litigation into court and asked that another be substituted in his place and the plaintiff and such defendant be required to adjudicate their respective claims to it, and the parties thereafter proceeded upon the assumption that such payment had actually been made, it will be presumed that the fact that the amount was in the hands of the clerk had been ascertained by the court prior to adjudging it to belong to the party entitled thereto, and its judgment will not be reversed for lack of evidence in this respect.

Interpleader—Judgment—Interest.

10. Allowance of interest on a sum of money, paid into court by a defendant upon application for interpleader, while in the hands of clerk awaiting judicial determination of the rightful owner, is error.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by A. E. Anderson against the Red Metal Mining Company, Paris Bros. and others. Judgment for plaintiff, and defendants Paris Bros. appeal from it and an order denying them a new trial. Modified and affirmed.

Mr. L. P. Forestell, and Mr. I. A. Cohen, for Appellants.

The object of this suit, so far as these defendants are concerned, was to cancel the assignment, which it is alleged they held. This calls for the exercise of equitable jurisdiction. Plaintiff wants the instrument canceled on the principle of *quia timet*. "The power to cancel a written instrument is a purely equitable remedy." (2 Pomeroy's Equity Jurisprudence, sec. 914; *Handley v. Sprinkle*, 31 Mont. 57, 77 Pac. 296; *Leopold v. Silverman*, 7 Mont. 266, 16 Pac. 580, 586; *County of Ada v. Bullen Bridge Co.*, 5 Idaho, 79, 188, 95 Am. St. Rep. 180, 47 Pac. 818, 825, 36 L. R. A. 367.) Jurisdiction of this class of actions is expressly denied justices of the peace. (Const., Art. VIII, sec. 1; *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695.)

Interpleader is exclusively an equitable remedy, and is included in the same class as injunctions and receivers. (1 Pomeroy's Equity Jurisprudence, pp. 195, 200, secs. 170, 171; 4 Id., p. 2651, sec. 1329, and cases cited; 23 Cyc. 35, 36, and cases

cited.) "The application is an appeal to the equitable jurisdiction of the court." (*Pustet v. Flannelly*, 60 How. Pr. 67; *Northwestern Mut. Life Ins. Co. v. Kidder*, 162 Ind. 382, 70 N. E. 489, 66 L. R. A. 89; *Miller v. Metropolitan Life Ins. Co.*, 68 Mo. App. 19.)

The granting of a motion for interpleader converts the law action into one in equity, thereby ousting a court not possessing equity jurisdiction from any further disposition of the case. (*Clark v. Mosher*, 107 N. Y. 118, 1 Am. St. Rep. 798, 14 N. E. 96; *Dinley v. McCullagh*, 92 Hun, 454, 36 N. Y. Supp. 1007; *Lawrence v. Lawrence*, 32 Misc. Rep. 503, 66 N. Y. Supp. 393.) Interpleader is of purely equitable cognizance, and a justice of the peace has no jurisdiction thereof. (*Duke v. Duke*, 93 Mo. App. 244; *Marcus v. Aufses*, 94 N. Y. Supp. 397 (City Ct. S. T.).) Neither was the application of the company for interpleader made before answer, nor was it accompanied by any affidavit such as in section 1760, Code of Civil Procedure. (*Hoyt v. Gouge*, 125 Iowa, 603, 101 N. W. 464; *First Nat. Bank of Cadiz v. Beebe*, 62 Ohio St. 41, 56 N. E. 485.)

The district court did not have jurisdiction to hear the appeal, the appellant failing to serve a notice of appeal upon all the adverse parties, that is to say, upon all whose rights might be affected by reversal of the judgment. (*Williams v. Santa Clara M. Co.*, 66 Cal. 193, 5 Pac. 85; see, also, *Toy v. San Francisco etc. R. R. Co.*, 75 Cal. 542, 17 Pac. 700.)

Messrs. Donovan & Melzner, for Respondent.

The purpose of the Code builders was to simplify the procedure and to make actions direct instead of circuitous. (Phillips' Code Pleading, secs. 286, 453.) For this purpose they drew largely upon the rules of equity in pleading and practice. (Phillips' Code Pleading, sec. 453.) And the Code conferred upon the law court, sitting as such, the power to make an order that a third party claimant be substituted as defendant in place of the party who has no interest in the controversy. (4 Pomeroy's Equity Jurisprudence, secs. 1320, 1329; Phillips' Code Pleading,

sec. 495; Cowdery's Justice Treatise, sec. 136; 23 Cyc. 15, 35.) Interpleader under the Code is not a "case in equity." (*Hamlyn v. Betteley*, 62 Q. B. Div. 63.) The following authorities expressly hold that this power of substituting the real party in interest for the one without interest is conferred on justice courts: 24 Cyc. 514; *Moore v. Ernst*, 54 Miss. 642; *Geller v. Puchta*, 1 Ohio C. C. 30; digested in 23 Cyc. 31, note 35; Cowdery's Justice Treatise, sec. 136. The following cases hold that after the substitution is made, the action continues an action at law: *Clark v. Mosher*, 5 N. Y. St. Rep. 84; *Magninis v. Schwab*, 24 Ohio St. 336; *Brownfield v. Canon*, 25 Pa. St. 299; see, also, Foster Federal Practice, sec. 88, equity directing action of law where both claims legal.

Neither Frankovich nor the Red Metal Mining Company was an "adverse party" within the meaning of the statute, upon whom it was necessary to serve notice of appeal. (*Merk v. Bowery Min. Co.*, 31 Mont. 298, 78 Pac. 519; *Ward v. Walker*, 111 Iowa, 611, 82 N. W. 1028; *Dittenhoefer v. Coeur d'Alene Clothing Co.*, 4 Wash. 519, 30 Pac. 660; *Koons v. Mellett*, 121 Ind. 585, 23 N. E. 95, 7 L. R. A. 231; *Watson v. Sawyer*, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43.)

The regularity of the order of substitution could not be reviewed in the district court because not raised in the justice court, the defendants Paris Bros. having voluntarily appeared. (*Clark v. Great Northern Ry.*, 30 Mont. 458, 465, 76 Pac. 1003.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action originated in a justice of the peace court. It was brought to recover a judgment against the Red Metal Mining Company, hereinafter referred to as the "company," upon an account for \$94 for labor performed for the company during September, 1907, by one Frankovich, which the plaintiff alleges had been assigned to him for value. Frankovich and Paris Bros., a copartnership, were made parties defendant.

The complaint contains allegations sufficient to state a cause of action against the company. No attempt is made to state a cause of action against Frankovich, nor in the prayer is judgment demanded against him. As to the appellants Paris Bros., it is alleged that they claim to be the assignees of the account under an assignment by Frankovich, but that this assignment is a forgery, and therefore void. In the prayer the plaintiff demands that the Paris Bros.' assignment be declared void, and that he have judgment for the amount of the account and for costs. Paris Bros. interposed a general demurrer to the complaint, which was sustained. The company filed an answer. After the demurrer of the Paris Bros. was sustained, it filed an amended answer, which was verified, in which it admitted all the allegations of the complaint, except as to the merits of the respective assignments of the plaintiff and Paris Bros. As to these, it is alleged that it had no knowledge or information sufficient to form a belief, and, further, that both plaintiff and defendants Paris Bros. were claiming the money due on the Frankovich account under their alleged assignments. It concluded with a prayer that an order be made allowing it to pay into court the amount of the account; that Frankovich and Paris Bros. be substituted as parties defendant in its stead; that the action be dismissed as to it; and that the plaintiff and Paris Bros. be required to submit their respective claims for determination. The order prayed for having been made, the company paid the amount of the account to the justice. Frankovich filed his answer, admitting that he had assigned the account to the plaintiff, and alleging that he had never after made any claim to the amount due thereon. Paris Bros., without objection and apparently without formal notice of the order, answered. After putting in issue the material allegations of the complaint, they allege, as the basis of their claim, that during the month of October, 1906, Frankovich being indebted to them to the amount of \$109, they instituted an action against him to recover the same; that they had caused an attachment to issue and to be levied upon the moneys due him from the company, to secure the

payment of the judgment which it sought to recover in the cause; that judgment was duly given and made in said cause in their favor, and against Frankovich for the sum of \$109 and costs; that they thereupon caused an execution to be issued thereon, and to be levied upon the moneys in the hands of the company, and that, by reason of these facts, the moneys in the hands of the court belonged to the defendants Paris Bros., and not to the plaintiff.

A trial on the issue thus framed resulted in a judgment in favor of the Paris Bros. Thereupon the plaintiff appealed to the district court. His notice of appeal was not served on Frankovich. When the record was filed in the district court, counsel for Paris Bros. moved to dismiss the appeal on the ground that the court was without jurisdiction of the action or of the appeal. This motion was overruled. The demurrer of Paris Bros., interposed before the order of substitution was made, was submitted to the district court, but was overruled. The trial resulted in a judgment for plaintiff; defendants Paris Bros. declining to offer any evidence, but contenting themselves with their general objection to the jurisdiction of the court to entertain the appeal and try the case. These defendants have appealed to this court from the judgment and an order denying them a new trial.

The contention is made that it is manifest from the complaint filed in the justice's court that the relief sought by the plaintiff is equitable in its nature, and that, since under the Constitution (Art. VIII, sec. 21) a justice's court has no equity jurisdiction, it had no power to proceed with the trial, hence the jurisdiction of the district court did not attach by virtue of the appeal, in that its jurisdiction on appeal is the same as that of the justice's court.

It has frequently been held by this court that, if the justice's court has no jurisdiction of the subject matter in a particular case, the district court on appeal acquires none, except to dismiss the appeal and render judgment for costs. (*Gassert v. Bogk*, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240; *Shea v. Regan*,

29 Mont. 308, 74 Pac. 737; *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695.) It does not necessarily follow, however, that the character of an action is to be determined by particular allegations incorporated in the complaint. In a given case a party may assume that he is entitled to equitable relief, and proceed to formulate his pleadings accordingly. It may be apparent therefrom that he is not entitled to the relief he seeks, yet he will not for this reason be turned out of court, if upon any theory of his pleading he is entitled to other relief. Under the Constitution (Art. VIII, sec. 28) there is but one form of action in this state. Law and equity may be administered in the same case. A mistake as to the form in which the action should be brought, or as to the relief which may be demanded upon the statement of facts made, is of no moment. If equitable relief is demanded, but the facts do not warrant this character of relief, a complaint will be sustained for legal relief, if the facts warrant it. (*Donovan v. McDevitt*, ante, p. 61, 92 Pac. 49.)

In this case the plaintiff made Frankovich and Paris Bros. parties. His counsel seem to have proceeded upon the assumption that by so doing he could secure the cancellation of the alleged forged assignment held by Paris Bros. In this they were in error. The court could not grant that character of relief. This contention was made by Paris Bros.' demurrer. The justice, in sustaining this, sustained the contention of defendants that he was without equitable jurisdiction. He retained the action as between the plaintiff and the company, as he should have done. This condition left a simple legal question of the liability of the defendant company to the plaintiff, which the justice had jurisdiction to determine. (Code Civ. Proc., sec. 66.) As between these parties the action was one arising on a contract for the payment of money. So far, then, there can be no doubt that the action of the justice was correct. A judgment rendered settling the question of the liability of the company to the plaintiff would have been valid.

Did the justice lose jurisdiction of the case by making the order of substitution? In other words, was the case converted into an equity case by this order? A solution of the question involved turns upon a correct answer to the inquiry: What is the scope and application of section 588 of the Code of Civil Procedure, which declares:

“A defendant against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order. And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made, and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent to one another.”

There is a conflict in the decisions as to the result of an order of substitution made under the first sentence of this section. Some of the courts, as in New York and Missouri (*Clark v. Mosher*, 107 N. Y. 118, 1 Am. St. Rep. 798, 14 N. E. 96; *Dinley, Admx., etc. v. McCullagh*, 92 Hun, 454, 36 N. Y. Supp. 1007; *Miller v. Metropolitan Life Ins. Co.*, 68 Mo. App. 19), hold that such a substitution converts a case which was at law into one of equitable cognizance. It seems to us, however, that these courts overlook the fact that the method of interpleader pro-

vided for in this portion of the section had its origin at the common law, and is cognizable by courts proceeding according to the common law. Originally in cases of joint bailment, when separate actions in detinue were brought by the bailors, the bailee might require them to interplead. If only one had brought suit and the other threatened to sue, the bailee might have the other brought in by garnishment. This might be done, also, by the finder of property under the same circumstances. (2 Story's Equity Jurisprudence, 801-803.) In one or two other kinds of actions at law this legal interpleader might be resorted to.

Our statute,—and most of the states have a similar one,—was modeled after the English statutes of 1 and 2 William IV (Chapter 58, section 1) and 23 and 24 Victoria (Chapter 126, section 12). The first included actions in debt, assumpsit, detinue, and trover. The latter was enacted to avoid the effect of the decision in *Crawshay v. Thornton*, 2 Mylne & C. 1 (English Rep. 40, Full Reprint, p. 541), in which it was held by Lord Cottenham that there can be no interpleader where the rights asserted by the claimants are independent, and have not a common origin (4 Pomeroy's Equity Jurisprudence, sec. 1324, notes). In the class of actions named, after substitution was made, the cause proceeded in the same court between the plaintiff and the substituted defendant, and the question of right was determined according to the course of the common law. (*Hamlyn v. Betteley*, 6 Q. B. Div. 63.) If a suit is not brought by either claimant, the person against whom the conflicting claims are made may bring his action in equity to compel them to interplead; for, having no cause of action against either of them, he cannot bring an action at law. The second sentence of the section provides for this situation. The last sentence embodies the provision of section 12 of the statute of Victoria, *supra*.

Clearly the section, taken as a whole, is intended to cover the subject of interpleader, both at law and in equity; one purpose being, as declared by the statute of William, *supra*, to enable courts of law to grant relief in a summary way in many cases

in which theretofore they could grant none. So, while there is a conflict in the decisions of the courts in the United States as to the question whether such cases as the one at bar become of equitable cognizance after substitution is made, there can be no doubt that on principle such is not the case. If the case be one which presents only legal issues, it is not changed in character merely by the substitution, but proceeds according to law, unless, as may be the case, some equitable defense is interposed which invokes the equity powers of the court. This may be the case under the Code, because our courts of general jurisdiction administer both law and equity. It could not be so, however, as pointed out above, in case arising in a justice's court. In support of this view, we cite the following authorities: 4 *Pomeroy's Equity Jurisprudence*, sec. 1329; *Maginnis v. Schwab*, 24 Ohio St. 336; *First Nat. Bank v. Beebe*, 62 Ohio St. 41, 56 N. E. 485; *McElroy v. Baer*, 9 Civ. Proc. Rep. (N. Y.) 133; *Satkofsky v. Jarmulowsky*, 49 Misc. Rep. 624, 97 N. Y. Supp. 357; *Bixby v. Blair & Co.*, 56 Iowa, 416, 9 N. W. 318; *Hoyt v. Gouge*, 125 Iowa, 603, 101 N. W. 464; *Moore v. Ernst*, 54 Miss. 642; note to *Clark v. Mosher*, 1 Am. St. Rep. 800; Phillips' Code Pleading, sec. 459.

The claims of the parties here present strictly legal issues. The plaintiff claims by assignment. The defendants Paris Bros. claim by virtue of their levy under their execution. The court was not called on to aid these defendants in any way to enforce the lien of their execution, but was required simply to determine whether they had a lien which was paramount to the title of the plaintiff under his assignment. If the plaintiff had not shown title under his assignment, these defendants would have been entitled to judgment for their costs, and they would have been entitled to nothing more if the suit had been brought in the district court, which has equitable jurisdiction, in the first instance. It is doubtful whether an action for equitable interpleader would have been entertained after this action was brought; for, as suggested in *Hoyt v. Gouge*, *supra*, the company had a remedy at law, which it properly invoked, and thus was

not entitled to go into a court of equity, because this remedy was adequate.

It is true that the formal affidavit was not filed. The application for substitution was made on the amended answer; but Paris Bros. became defendants without protest or objection. The irregularity in the mode of their substitution was thus waived.

It is said that the district court had no jurisdiction of the appeal because Frankovich was not served with the notice, as required by the statute. (Code Civ. Proc., sec. 1760.) An adverse party, within the meaning of this statute, is one "who has an interest in opposing the object sought to be accomplished by the appeal." (*Power & Bro. v. Murphy*, 26 Mont. 387, 68 Pac. 411.) In *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103, it is said: "Whether a party to the action is 'adverse' to the appellant must be determined by their position on the record and the averments in their pleadings, rather than from the manner in which they manifest their wishes at the trial, or from any presumption to be drawn from their relations to each other, or to the subject-matter of the action in matters outside of the action.

* * * If his (the party's) position on the record makes him nominally adverse, he must be so considered for the purpose of an appeal from the judgment thereon." While this is true, it does not follow that one who is neither a necessary nor a proper party to the action must be considered adverse merely because he appears as such upon the record. Having parted with his title to the fund by his assignment to the plaintiff, as he admits, Frankovich was not a necessary or proper party, because he had no interest in the action. His presence as a party, therefore, was no more appropriate than that of any other stranger. No relief was demanded against him, nor did he demand any. Nor could he have any interest in the result of the appeal. The justice might have dismissed the action as to him of his own motion. This would not have affected him in the least. Under such circumstances, he was not an adverse party, and it was

not incumbent upon plaintiff to treat him as such. The motion to dismiss the appeal was properly denied.

It is said that the court should have sustained Paris Bros.' demurrer. In this contention there is no merit. The justice sustained the demurrer, and practically dismissed these defendants out of the case. This was upon the theory, presumably, that he would not entertain the action as brought and grant the relief demanded against them. It had accomplished its purpose. When the order of substitution was made, the objection was not urged that the complaint did not tender an issue upon the question of right between them and the plaintiff. The district court should have disregarded it, as it virtually did by overruling it.

The court overruled an objection to evidence of a conversation had between plaintiff and Frankovich at the time the assignment was made. The conversation related to the consideration for the assignment; such consideration being medical services rendered to Frankovich by the plaintiff, who is a physician. No question was made as to the sufficiency of the consideration to support the assignment, nor as to whether it was for value. The evidence was therefore not competent. But it is apparent that the ruling was not prejudicial. The appellants offered no evidence, but rested their case entirely upon their objection to the jurisdiction. Upon the evidence furnished by the writing alone, the court was justified in directing a verdict for plaintiff as it did. The admission of the incompetent evidence could not have affected the judgment of the court in this matter.

The verdict returned under the direction of the court is as follows: "We, the jury in the above-entitled action, find as our verdict that the plaintiff A. E. Anderson is entitled to the sum of \$94 heretofore paid into court." It is said that there is no evidence that any sum had been paid into court, and hence no evidence to support this verdict. It is apparent, however, that the parties and the judge proceeded upon the assumption that the company had paid to the justice the amount in controversy at the time it was dismissed from the case and was in the

hands of the clerk at the time of the trial. The fact that it had been paid to the justice is recited in the answer of Paris Bros. In any event, we must assume that the fact that it had been paid to the clerk was known to the court, or, if not actually known, was ascertained before it adjudged that the sum belonged to the plaintiff. There is no merit in this contention.

The judgment entered declares the plaintiff entitled to recover of Paris Bros. the sum of \$94 in the hands of the clerk, with interest and costs. It is not correct in awarding any recovery as against the appellants, except for costs. It would be manifestly wrong that appellants should be compelled to pay interest for the time during which the sum in controversy was in the hands of the clerk. The judgment should simply have awarded the sum in dispute to the plaintiff, and adjudged appellants to pay the costs.

The cause is remanded, with directions to the district court to modify the judgment as herein indicated. When so modified it will stand affirmed, the respondent to recover his costs.

Modified and affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

KENNEDY, RESPONDENT, v. THE GRAND FRATERNITY,
APPELLANT.

(No. 2,460.)

(Submitted December 5, 1907. Decided December 16, 1907.)

[92 Pac. 971.]

*Insurance—Fraternal Societies—Nonpayment of Dues—Time—
Essence of Contract—Forfeiture—Reinstatement—Burden of
Proof—Discretion—Waiver—Estoppel in Pais—Agents—
Ratification.*

Insurance—Fraternal Societies—What Constitutes Contract.

1. The certificate issued by a fraternal insurance order, together with the provisions of its constitution and by-laws, constitute the contract of insurance between it and one of its members.

Same—Nonpayment of Dues—Forfeiture.

2. It is competent for a fraternal insurance society to make a contract of life insurance with one of its members, containing a provision, among others, that failure to make payment of dues within the time allowed for making payment, shall work a forfeiture of his certificate, without notice to or demand upon the insured.

Same—Payment of Dues—Time—Essence of Contract.

3. Where a certificate of insurance of the character of the one above referred to provides that it shall be void if payment of dues or premium is not made at a specified time, time is of the essence of the contract, and failure to make payment on or before such time works an absolute forfeiture.

Same—Delinquency—Reinstatement—Burden of Proof.

4. Where one, insured under a contract with a fraternal insurance order, had become delinquent by failure to pay his dues and premium at a specified time, and, upon insured's death, his beneficiary relied for recovery upon a condition subsequent, to wit, decedent's reinstatement prior to his death, which was denied in the answer—she assumed the burden of proof upon that issue.

Same—Delinquency—Reinstatement—Requisites.

5. The provisions of the constitution and by-laws of a fraternal insurance society, relative to the method to be pursued by a delinquent member to bring about his reinstatement, must be construed together; hence, a literal compliance with one provision, which required the filing of a proper application with, and payment of the dues and assessments in arrears to, the collector of a local lodge, did not alone work a reinstatement, where it was also made incumbent upon the applicant, by a subsequent provision, to furnish proof of his then good health, and where thereupon his reinstatement depended upon the approval of the application by the secretary of the grand body.

Same—Delinquency—Reinstatement—Discretion.

6. If, in passing upon an application for reinstatement to membership in a society of the kind referred to above, the officer of the grand body to whom proof of the applicant's good health must be submitted, in the exercise of the discretion lodged in him, decides adversely to the applicant, the latter cannot complain.

Same—Delinquency—Reinstatement—Proof.

7. The constitution and by-laws of a fraternal insurance society provided, among other things, that the "secretary" of the grand body should pass upon applications for reinstatement of delinquent members. The officer performing the duties of secretary for a local branch was styled "collector." A member, delinquent for two months, paid all dues in arrears and also those for a current month, to the collector of the subordinate lodge. The insured died while his application for reinstatement was pending. *Held*, that, since the officer whose duty it was to pass upon such applications was the "secretary" of the grand body, and not the person who acted as such officer for the local branch, a reinstatement was not the result of a remark, claimed to have been made by the collector, when accepting payment of the dues, that the delinquent was again in good standing.

Same—Delinquency—Reinstatement—Evidence—Insufficiency.

8. Evidence reviewed in the cause mentioned in the foregoing paragraphs, and *held* to be insufficient to show a reinstatement of the delinquent member prior to his death.

Same—Delinquency—Waiver.

9. Where the delinquency of a member in a fraternal insurance society operated *ipso facto* to terminate his membership and to abrogate his contract of insurance, and he knew that the secretary of the grand lodge only was vested with the authority to pass upon his application for reinstatement, and there was nothing further that he could do toward his reinstatement, he could not have been misled to his prejudice by anything said or done by the collector of the local branch of the society when accepting payment of dues in arrears and those not yet due, into the belief that the society had waived its right to declare a forfeiture of his certificate upon non-payment at a specified time, and the doctrine of waiver was, therefore, not applicable.

Same—Delinquency—Estoppel *in Pais*.

10. Where the record in the above action did not show that either the insured or his beneficiary was misled to his or her prejudice by the silence of the insurer when in equity and good conscience it ought to have spoken, or by some affirmative act or conduct on its part, in the matter of the insured's delinquency or reinstatement, the doctrine of estoppel *in pais* was inapplicable.

Same—Delinquency—Reinstatement—Evidence of Good Health—Discretion.

11. The officer in whom was lodged the authority to pass upon applications for reinstatement of delinquents to membership in a fraternal insurance order, may not be said to have abused the discretion vested in him by the constitution and by-laws of the society, in rejecting an applicant who, according to the evidence, had, about two months prior to his application for reinstatement, been confined to his bed by pneumonia for three weeks, a disease shown to be often accompanied by serious lung troubles.

Same—Delinquency—Reception of Current Dues—Reinstatement—Unauthorized Act of Agent—Ratification.

12. The defendant insurance society mentioned in the foregoing paragraphs, had never intentionally conferred authority upon its local collector to waive delinquency or to receive current dues after delinquency, nor did the collector believe that he had such authority. The delinquent knew that only the secretary of the grand body could reinstate him. The dues, both delinquent and current, paid to the collector were never forwarded to the central body but retained by him subject to the approval of the application for reinstatement. Immediately upon receipt of the application it was rejected and the collector directed to tender back the amount paid. *Held*, that a ratification by the society of the unauthorized act of its local collector had not been shown, and that therefore the insurer was not estopped to claim a forfeiture.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Mary Kennedy against The Grand Fraternity. From a judgment for plaintiff and an order denying it a new trial, defendant appeals. Reversed and remanded.

STATEMENT OF THE CASE, BY THE JUSTICE DELIVERING THE
OPINION.

This is an action to recover upon a policy of life insurance. With a single exception, it may be said that there is not any dispute as to the facts, which, as disclosed by the pleadings and undisputed testimony, are: Prior to March, 1905, Patrick Kennedy became a member of The Grand Fraternity, a fraternal insurance society or company, organized under the laws of Pennsylvania, and with the head offices at Philadelphia. Frederick Gaston was president, and W. E. Gregg secretary of the grand lodge or body. Subordinate lodges or societies were instituted in different communities, one being located in Butte, of which Kennedy was a member. Upon the approval of his application for membership there was issued to Kennedy a policy of life insurance, denominated "death benefit certificate," for \$2,000, payable at his death to Mary Kennedy, his wife. The premium on this policy was \$5.60, payable monthly. This policy contained a provision that if the insured "shall fail to pay the dues as required, * * * this certificate shall be null and void," and also referred to the constitution and by-laws of the order, which are made a part of the policy.

Among other provisions of the constitution and by-laws are the following: "Any *frater* who fails or neglects to pay, or cause to be paid, the monthly beneficial dues on or before the last secular day of the calendar month, as required, shall thereupon become suspended by his own act, and his benefit certificate or certificates shall be absolutely void. * * * Any beneficial member who shall fail to pay the monthly dues on or before the last secular day of the calendar month, as required, shall thereupon, and in each and every such case, for himself, and his beneficiary or beneficiaries, forfeit all right to any disability or death benefit from the fraternity, and his benefit certificate or certificates shall be absolutely void. * * * Every *frater* shall cease to be in good standing by failure to pay the dues, as required, and in every such case shall thereupon forfeit all

privileges and benefits of membership, and all liability of the *frater* to the fraternity, and all liability of the fraternity to the said *frater*, or any beneficiary under or because of any certificate issued for or on account of his beneficial membership, shall thereupon end and be forever determined."

Kennedy failed to pay any dues for the month of April or the month of May, 1905. On June 19th Kennedy made application for reinstatement in the order, tendering with the written application all fees then due, including the dues which would be required for the month of June in case he was reinstated. This application and these dues were delivered to one Hutchinson, the collector of the local lodge in Butte, who retained the dues and forwarded the application to the secretary of the grand lodge at Philadelphia. On June 24th the secretary of the grand lodge disapproved the application for reinstatement. On June 30th Patrick Kennedy died, and on the same day, after his death, notice of the action of the grand lodge was given to the beneficiary by Hutchinson. Because of the failure of the company to pay the amount of the policy, or any part thereof, this action was commenced by the beneficiary named in the policy. The plaintiff recovered judgment for the amount of the policy, and from the judgment and order denying it a new trial the defendant appeals.

Messrs. Kirk, Varnum & Kirk, for Appellant.

If an insurance policy contains a condition by which it is to be void if payment of dues is not made at an appointed time, time is material and of the essence of the contract, and failure to make prompt payment will work absolute forfeiture. (*Field v. National Council*, 64 Neb. 226, 89 N. W. 773; *Borgraefe v. Supreme Lodge*, 22 Mo. App. 127; *Illinois Masons Benevolent Soc. v. Baldwin*, 86 Ill. 479; *Karcher v. Supreme Lodge*, 137 Mass. 368; *Sick v. Covenant Mutual Life Ins. Co.*, 79 Mo. App. 609; *Bosworth v. Western Mutual Aid Soc.*, 75 Iowa, 582, 39 N. W. 903; *Hogins v. Supreme Council*, 76 Cal. 109, 9 Am. St. Rep. 173, 18 Pac. 125; *Grand Lodge v. Marshall*, 31 Ind. App.

534, 99 Am. St. Rep. 273, 68 N. E. 605; *Butler v. Grand Lodge*, 146 Cal. 172, 79 Pac. 861; *Adams v. Grand Lodge*, 66 Neb. 389, 92 N. W. 588; *Lehman v. Clark*, 174 Ill. 279, 43 L. R. A. 648, 51 N. E. 222; *Parker v. Bankers Life Assn.*, 86 Ill. App. 315.)

There is no evidence or claim that Hutchinson's remarks at the time the dues were left with him caused the deceased or plaintiff to do or neglect to do anything to prevent the grand secretary from approving the application for reinstatement. Neither is there anything to show that the defendant had any knowledge of Hutchinson's remark; hence, there can be no estoppel. (*Whigham v. Supreme Court I. O. F.*, 44 Or. 543, 75 Pac. 1067; *Field v. National Council*, 64 Neb. 226, 89 N. W. 773.)

Mr. Jesse B. Roote, Mr. Peter Breen, and Mr. A. C. McDaniel,
for Respondent.

A waiver of a condition of a forfeiture arises from the receipt of a premium or due by the company's agent, with knowledge of the breach of the condition or of the forfeiture. And if an insurance company collects and receives subsequent dues or assessments after a right to declare a forfeiture, the company waives the forfeiture for nonpayment of the prior dues. And the appellant, by accepting, through its agent, payment for the month of June, waived all right to declare a forfeiture, and is liable. (*Millard v. Supreme Council*, 81 Cal. 340, 22 Pac. 864; *McDonald v. Supreme Council*, 78 Cal. 49, 20 Pac. 41; *Murray v. Home etc. Assn.*, 90 Cal. 402, 25 Am. St. Rep. 133, 27 Pac. 309; *Tobin v. Western etc. Soc.*, 72 Iowa, 261, 33 N. W. 663; *McGowan v. Northwestern Legion of Honor*, 98 Iowa, 118, 67 N. W. 89; *Towle v. Ionia etc. Co.*, 91 Mich. 219, 51 N. W. 987; *Stylow v. Wisconsin etc. Co.*, 69 Wis. 224, 2 Am. St. Rep. 738, 34 N. W. 151; *Rice v. New England etc. Co.*, 146 Mass. 248, 15 N. E. 624; *Rowswell v. Equitable etc. Co.*, 13 Fed. 840; *Watson v. Centennial etc. Co.*, 21 Fed. 698; *McKinney v. German Ins. Soc.*, 89 Wis. 653, 46 Am. St. Rep. 861, 62 N. W. 413; *Daniher v. Grand Lodge*, 10 Utah, 110, 37 Pac. 245; *Bailey v. Mutual Ben. Assn.*, 71 Iowa, 689, 27 N. W. 770; *Metropolitan Ins. Co. v.*

Windover, 137 Ill. 417, 27 N. E. 538; *Griesa v. Massachusetts Ben. Assn.*, 133 N. Y. 619, 30 N. E. 1146; *Walsh v. Aetna etc. Co.*, 30 Iowa, 133, 6 Am. Rep. 664; *Sweetser v. Odd Fellows*, 117 Ind. 97, 19 N. E. 722.)

An insurance company is estopped to deny the right of an agent to perform acts which are within the scope of his authority. And where a certain state of facts exists of which the agent, acting within the scope of his authority, has knowledge at the time he was so acting, such knowledge will act as a waiver, and will estop the company from availing itself of a forfeiture. (*Walsh v. Aetna etc. Co.*, 30 Iowa, 133, 6 Am. Rep. 664; *Logsdon v. Supreme Lodge*, 34 Wash. 666, 76 Pac. 292; *Sweetser v. Odd Fellows*, 117 Ind. 97, 19 N. E. 722; *Jennings v. Metropolitan etc. Co.*, 148 Mass. 61, 18 N. E. 601; *Alexander v. Grand Lodge*, 119 Iowa, 519, 93 N. W. 508; *Loughbridge v. Iowa Life etc. Co.*, 84 Iowa, 141, 50 N. W. 568; *Modern Woodmen v. Colman*, 68 Neb. 660, 94 N. W. 814, 96 Pac. 154; *Erdman v. Mut. Ins. Co.*, 44 Wis. 376; *Painter v. Insurance Co.*, 131 Ind. 68, 30 N. E. 876; *Northwestern etc. Co. v. Amerman*, 119 Ill. 329, 59 Am. St. Rep. 799, 10 N. E. 225; *Viele v. Germania etc. Co.*, 26 Iowa, 9, 96 Am. Dec. 83; *Combs v. Insurance Co.*, 43 Mo. 148, 97 Am. Dec. 383; *American Insurance Co. v. Gallatin*, 48 Wis. 36, 3 N. W. 772; *Hastings v. Brooklyn etc. Co.*, 138 N. Y. 473, 34 N. E. 289; *Van Houten v. Pine*, 38 N. J. Eq. 72; *Hartford etc. Co. v. Hayden*, 90 Ky. 39, 13 S. W. 585; *Knarston v. Manhattan etc. Co.*, 124 Cal. 74, 53 Pac. 773; *Snyder v. Nederland etc. Co.*, 202 Pa. St. 161, 51 Atl. 744; *Oshkosh v. Germania etc. Ins. Co.*, 71 Wis. 454, 5 Am. St. Rep. 233, 37 N. W. 819; *West Coast etc. Co. v. State etc. Ins. Co.*, 98 Cal. 502, 33 Pac. 258; *Trotter v. Grand Lodge*, 132 Iowa, 513, 109 N. W. 1099; *Supreme Lodge v. Withers*, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762; *Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158, 39 Am. St. Rep. 637, 26 Atl. 27; *Silverberg v. Phoenix etc. Co.*, 67 Cal. 36, 7 Pac. 38; *Kruger v. Western etc. Ins. Co.*, 72 Cal. 91, 1 Am. St. Rep. 42, 13 Pac. 156.)

Forfeitures are not favored in the law. (*Knarston v. Manhattan etc. Co.*, 124 Cal. 74, 53 Pac. 773.)

The following cases support the view that, under the circumstances, as those in the case at bar, the question of waiver should be submitted to the jury: *Sweetser v. Odd Fellows*, 117 Ind. 97, 19 N. E. 722; *Jennings v. Metropolitan etc. Co.*, 148 Mass. 61, 18 N. E. 601; *North British etc. Co. v. Steiger*, 124 Ill. 81, 16 N. E. 95; *Brumfield v. Union Ins. Co.*, 87 Ky. 122, 7 S. W. 893; *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414, 15 Am. St. Rep. 275, 39 N. W. 571; *Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158, 39 Am. St. Rep. 637, 26 Atl. 27; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6.

Where the insured has complied with all the requirements of reinstatement, and the evidence in this case showed he did, the insurance company cannot arbitrarily and without cause refuse to reinstate. (*Dennis v. Mass. Ben. Assn.*, 120 N. Y. 496, 17 Am. St. Rep. 660, 24 N. E. 843, 9 L. R. A. 189; *Lovick v. Provident Life Assn.*, 110 N. C. 93, 14 S. E. 506; *French v. Mutual etc. Assn.*, 111 N. C. 391, 32 Am. St. Rep. 803, 16 S. E. 427; *Van Houten v. Pine*, 38 N. J. Eq. 72.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The complaint, among other things, alleges: "(6) That at the time of his said death, as above set forth, the deceased was a member in good standing of the said corporation known as The Grand Fraternity, defendant above named." This is denied in the answer.

The solution of this controversy depends upon the answer to the question, What was the effect upon Kennedy's membership of his failure to pay the dues for April and May, 1905? The policy of insurance, together with the provisions of the constitution and by-laws of the order applicable, constitute the contract between the parties. (25 Cyc. 744; 3 Am. & Eng. Ency. of Law, 2d ed., 1080, 1081; *O'Connor v. Grand Lodge A. O. U. W.*, 146 Cal. 484, 80 Pac. 688; 5 Current Law, 1528.)

The constitution and by-laws, quoted above, provide that if the assured, denominated "frater," shall fail to pay his monthly dues on or before the last secular day of the month for which the same are due and payable, he shall "thereupon become suspended by his own act, and his benefit certificate or certificates shall be absolutely void," and such failure shall forfeit all right of the insured or beneficiary, to any death benefit from the defendant fraternity, and such failure to pay shall forfeit all privileges and benefits of membership of the insured, and upon such failure to pay, all liability of the defendant fraternity to the insured, or beneficiary, because or on account of the certificate or policy, shall "thereupon end and be forever determined." These provisions seem too plain to admit of construction or interpretation. The mere failure of Kennedy to pay his dues for April and May, *ipso facto* worked a forfeiture of his membership and an abrogation of the contract between the parties. That it is perfectly competent for the parties to make a contract of this character, which provides that the failure to make payment of dues within the time allowed shall work a forfeiture, without notice to or demand upon the insured, is beyond controversy. (25 Cyc. 831, and cases cited.)

It is a general rule of the law of life insurance, that if the contract of insurance contains a provision like the one in controversy, by which it is void if payment of the dues or premium is not made at an appointed time, then time is of the essence of the contract, and a failure to make payment on or before the appointed time works an absolute forfeiture. (19 Ency. of Law, 2d ed., 44, 47, and cases cited; *Butler v. Grand Lodge A. O. U. W.*, 146 Cal. 172, 79 Pac. 861; 2 Bacon on Benefit Societies and Life Insurance, 3d ed., secs. 354, 385.) Under the terms of this contract, then, Kennedy forfeited his membership in the society and any right which he or his beneficiary had by virtue of the policy.

But it is further alleged in the complaint that on June 19, 1905, the insured paid to the defendant all dues, fines and penalties due to July 1, 1905, which sum "was accepted by the

defendant herein as payment in full of all dues, fines and penalties of said beneficiary certificate for said period of time, and the said defendant reinstated the said deceased, Patrick Kennedy, and the said Patrick Kennedy then by reason of said payment so made by him and accepted by said defendant became in good standing in said organization, defendant above named, and entitled to all the rights and benefits accruing to him under the said certificate set forth." These allegations are also denied in the answer; and plaintiff is now seeking to recover upon the theory that Kennedy was reinstated in the society and his contract of insurance revived prior to his death. In other words, the plaintiff is relying upon the performance by Kennedy of a condition subsequent, and, having pleaded and relied upon his reinstatement, it is well settled that she assumed the burden of proof upon that question, since it is denied in the answer that Kennedy ever was reinstated. (*Brun v. Supreme Council A. L. of H.*, 15 Colo. App. 538, 63 Pac. 796; 2 Bacon on Benefit Societies and Life Insurance, sec. 469.)

In this connection respondent relies upon the first paragraph of section 4, article 8, of the constitution and by-laws of the order, which provides: "Any *frater*, who shall have forfeited his benefit certificate or certificates by a default in the payment of dues, if then in good health, may be reinstated and his benefit certificate revived, by presenting an application to the collector of the branch, or to the secretary, accompanied by the amount in arrears, together with a fine of not exceeding 15 per cent additional." And it is said, in effect, that all that could be demanded of Kennedy was that he file with the collector of the local lodge a proper application for reinstatement,—which he did,—and accompany it with the necessary fees then in arrears,—which he did (no fines were demanded); and, therefore, having met all the requirements of this paragraph, Kennedy was thereby reinstated in the society, and neither the society nor its officers could arbitrarily refuse to recognize such reinstatement, and, if the premise upon which this conclusion is based is correct, the conclusion is uncontrovertible. But the

remaining paragraph of that section reads as follows: "In every such application, the applicant shall furnish satisfactory proof that he is in good health, and, if no charges of any kind are pending against him (and the application shall be approved by the secretary) the applicant shall thereupon become reinstated and his benefit certificate revived and again in force."

But respondent contends that, notwithstanding this last paragraph, the first paragraph above provides a complete method for the reinstatement of a delinquent member, with all the terms of which Kennedy fully complied. But we are not able to agree with this construction. We think the entire section must be read together; that it provides only one method for the reinstatement of a delinquent member, and the plaintiff, having relied upon Kennedy's reinstatement, assumed the burden of proving (1) that the deceased made application for reinstatement, (2) that dues in arrears were paid, (3) that at the time of making such application he furnished to the defendant satisfactory proof that he was in good health, and (4) that the application was approved by the secretary, unless some of these requirements were waived, or the society estopped itself to claim that Kennedy had forfeited his membership. Any other construction of this section of the constitution and by-laws would render the second paragraph, above, absolutely meaningless.

It may be conceded that the insured complied literally with provisions 1 and 2, just stated. But this contract is to be distinguished from other contracts of life insurance, which provide that upon the doing by the insured of certain acts he thereby becomes *ipso facto* reinstated. This contract requires, in addition to the acts and things to be done on the part of the insured, that the society, or its officers, shall take certain affirmative action which involves the exercise of discretion and judgment; for the insured is only reinstated upon furnishing satisfactory evidence that he is in good health, and securing the approval of the grand secretary. In *Butler v. Grand Lodge*, 146 Cal. 172, 79 Pac. 861, the court said: "It was entirely within the power of the parties to agree as to the terms and conditions of rein-

statement. The question in such case is as to what the agreement of the parties was, and where the language of the agreement is clear and unequivocal, the courts have no choice but to enforce the contract as it is written." We agree with this conclusion, and are unable to see anything in the contract with reference to reinstatement that is unconscionable or ought not to be enforced by the courts.

While there is nothing in this record to indicate to what officer or body the evidence of Kennedy's good health was referable, or who was to exercise the discretion provided for by the constitution and by-laws with respect to that evidence, since the application had to receive the approval of the secretary of the grand lodge, it would seem to be a fair inference that the evidence must be satisfactory to that officer. The record fails to disclose for what reason the secretary of the grand lodge refused to approve the application; but since the plaintiff assumed the burden of showing that Kennedy had been reinstated prior to his death, the failure in this regard is a failure of proof on the part of the plaintiff, for it may be true, as she contends, that if the proof of Kennedy's good health was satisfactory to the secretary of the grand lodge, he could not arbitrarily refuse to approve the application for reinstatement, since it appears to be conceded that there were no charges pending against Kennedy. But in order to show that Kennedy was reinstated, she assumed the burden of showing that the evidence of his good health was satisfactory to the officer who, or body which, was to pass upon the same.

We think it cannot be controverted that where a discretion is vested in some officer or examining board the applicant for reinstatement cannot complain if such discretion is exercised against his interests. In other words, if there is any doubt in the mind of the officer or body having to pass upon the sufficiency of such evidence of good health, then such officer or body may exercise his or its judgment or discretion in the matter; and if such judgment is exercised and a decision is reached

adverse to the applicant, no complaint can be made. (25 Cyc. 849.)

But respondent contends that the secretary of the society did approve of Kennedy's application for reinstatement. This contention, however, is based upon the assumption that Hutchinson was the secretary referred to in the constitution and by-laws above, and that when Kennedy's application for reinstatement was presented to him, with the accompanying fees, he receipted for them as dues for the months of April, May and June, and stated to Mrs. Kennedy, who presented the application, that he (Kennedy) was in good standing until July. But this contention cannot be sustained. The evidence is uncontroverted that there was but one officer designated "secretary," and that was the secretary of the grand body, W. E. Gregg, of Philadelphia, Pennsylvania. And, as indicating that this fact was well understood by the insured during his life time, it is only necessary to call attention to a provision in his application for reinstatement in which he says: "And I do hereby agree that my reinstatement as a beneficial member is and shall be upon the express condition that the above representations are true, full and complete at the time of the receipt and approval of this application by the secretary of The Grand Fraternity." Hutchinson denied that he made the statement attributed to him. He testifies that he may have said that the application itself was all right, meaning that it was in proper form.

While it is alleged in the complaint that the defendant society accepted the dues tendered with the application for reinstatement, that is denied, and the testimony is uncontroverted that Hutchinson received the dues, as the constitution provides he should do in case of an application for reinstatement, so far as the dues were delinquent, but that they were not forwarded to the grand lodge as other dues and fees were, but were retained by Hutchinson to await the action of the grand lodge upon the application for reinstatement, and, when the application was rejected, the fees and dues so deposited with Hutchinson were tendered by him to this plaintiff immediately after the death of

her husband, and within a week after the application was rejected in Philadelphia.

Viewed, then, in the light most favorable to this plaintiff, the evidence wholly fails to show that Kennedy was reinstated prior to his death, or at all, since his application failed to receive the approval of the secretary of the grand body, the officer who, under the contract of insurance, was vested with authority to approve or disapprove the same.

With respect to the effect of the delinquency of a member upon his membership, it may be said in general terms that all contracts of life insurance fall into one or the other of the two following classes: The first class comprehends all contracts which provide that upon default of the member he is liable to suspension or expulsion; and the second class comprises contracts by the terms of which the member's delinquency *ipso facto* works a loss of membership. The first class contemplates some affirmative action on the part of the society in order to fully terminate the membership. The second does not. Under a contract of the first class, even during the period of delinquency, and prior to such affirmative action having been taken, the delinquent is nevertheless a member of the society, with certain rights and certain claims upon the society. Under a contract of the second class, immediately upon the delinquency happening, the membership terminates and the delinquent has not any longer a claim against the society. These principles and this distinction ought to be kept in mind in determining the last contention of the respondent, which is, that notwithstanding Kennedy's failure to pay the dues for April and May, the defendant society waived the forfeiture of his policy and cannot now be heard to say that he was not a member in good standing at the time of his death. This contention is based upon (a) the receipt of dues for June, and (b) the conduct of Hutchinson. Under a contract of the first class above, it is well settled that by the receipt of current dues by the society during the period of the member's delinquency, and before the necessary affirmative action has been taken to terminate the membership, the society

thereby waives its right to declare a forfeiture of such membership.

While the courts have not infrequently used the terms "waiver" and "estoppel" interchangeably, we do not see how waiver, strictly speaking, can have any application to a contract of the second class above. The doctrine of waiver has for its very existence the assumption that by reason of the action of the society the insured has been misled to his prejudice. Familiar illustrations of the application of this doctrine are found in the numerous decided cases, where it has been determined that, by accepting dues or premiums after they were delinquent, the society thereby led the insured to believe that payment on time would not be insisted upon strictly. In such cases the courts have quite uniformly held that the society waived its right to insist upon payment at the appointed time, and if the insured thereafter did not strictly observe the precise time of payment, he ought not thereby be held to forfeit his rights, since he might have complied literally with the terms of his contract but for the course of conduct on the part of the society, which misled him into his delinquency.

But we are unable to see how this doctrine can have any application to the case at bar. Kennedy's delinquency operated *ipso facto* to terminate his membership and to abrogate his contract. His application for reinstatement looked only to a renewal of his membership and a revival or recreation of his contract. Having done everything which he could do, he was still not reinstated, but his reinstatement was thereafter made to depend upon favorable action by the secretary of the grand lodge or body.

Assuming, then, that Hutchinson did just what respondent claims he did do, wherein was Kennedy or his wife, the beneficiary, misled? What more could they have done if Hutchinson had acted differently,—for instance, had said that he did not believe Kennedy would be reinstated? Possibly they could have furnished additional evidence as to the state of Kennedy's health if Hutchinson had expressed to them any doubt as to

the sufficiency of the evidence already furnished; but the uncontradicted evidence is that Hutchinson "had no authority whatever to pass upon the application for reinstatement," and furthermore, since they knew that the application had to be passed upon by the secretary of the grand body and could not become effective until it had received the approval of that officer, it seems impossible that they could have been misled by anything said or done by Hutchinson. Furthermore, it is significant that, though Mrs. Kennedy was a witness in her own behalf, there is not any suggestion in her testimony that she ever relied to any extent whatever upon the statements made by Hutchinson, or that either she or her husband would have acted differently under different circumstances, further than the bare statement by plaintiff that she followed the instructions of Hutchinson in preparing the application for reinstatement. There is but one conclusion to be drawn from this record, and that is that they were not misled at all, for notwithstanding anything said or done by Hutchinson, the application for reinstatement itself discloses that they knew that in any event Kennedy's reinstatement depended upon the approval of his application by the grand secretary.

We do not mean to say that the doctrine of estoppel, strictly so called, has no application to a contract of the second class above. On the contrary, it is directly applicable. But, assuming, which we do not decide, that the allegations of the complaint with respect to waiver are sufficient for a pleading of estoppel, they amount only to a pleading of an estoppel *in pais*, and the proof falls short of establishing an estoppel of that character. With respect to the doctrine of estoppel *in pais* this court in *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918, quoted with approval from 11 Encyclopedia of Law, second edition, 421, the following: "The most usual application of the doctrine of estoppel *in pais* arises from the misrepresentation or concealment of material facts on the part of the person to be estopped. Thus it is a well-settled rule of equity which has been adopted by the courts at law that where A has, by his acts or representations,

or by his silence when he ought to speak out, intentionally or through culpable negligence induced B to believe certain facts to exist, and B has rightfully acted on this belief, so that he will be prejudiced if A is permitted to deny the existence of such facts, A is conclusively estopped to interpose a denial thereof." The very essence of this doctrine is that the party relying upon the estoppel was misled to his prejudice by reason of the silence of the other party, when in equity and good conscience he ought to have spoken, or by reason of the affirmative acts or conduct of such other party. There is nothing in this record to indicate that either Kennedy or his wife was misled.

It is said, however, by respondent, that if the evidence of Kennedy's good health was not satisfactory to Gregg, he should have called for additional evidence, and by not doing so he tacitly admitted that the evidence upon that subject was sufficient. We do not think this is correct under a contract of this character. Neither do the authorities cited by respondent, as we read them, bear out her contention. The contract of insurance lodged a discretion in the grand body or its secretary, in passing upon the evidence of good health, and in view of Kennedy's own statement in his application for reinstatement that he had been confined to his bed by pneumonia for about three weeks in February and March, 1905, we think it cannot be said, even in view of Kennedy's further statement, "I claim to feel better at the present time than I have for years," that the secretary of the grand lodge ought to have reached a different conclusion upon the application, particularly in view of the testimony of Dr. Moore, a witness for plaintiff: "Some of the ailments which follow pneumonia are abscess of the lungs, chronic pleurisy, chronic congestion of the lungs, which might finally lead to what is termed fibroid condition of the lungs, which is somewhat similar to miner's consumption that sometimes follows attacks of pneumonia among the miners in this camp." And this is true even though Dr. Moore considered Kennedy in good health at the time of his application for reinstatement. From the very fact that these other ailments do sometimes fol-

low attacks of pneumonia, the inference is strong, at least, that different physicians might reasonably reach different conclusions as to the character of Kennedy's risk. In any event, the discretion was lodged in the secretary of the grand body, and there is not anything in this record to show an abuse of such discretion.

But respondent cites numerous cases holding that where an insurance society, with full knowledge of the member's delinquency, accepts current dues, it thereby waives its right to insist upon a forfeiture of the policy because of such delinquency, and that these cases state a correct rule is beyond question. They are applicable to a contract of the first class above. Cases may be found, also, holding that under a contract of the second class, if the society, with knowledge of the delinquency, accepts current dues, it is thereby estopped to claim that a forfeiture had been worked by such delinquency. Within the doctrine last announced respondent claims this case falls. It is contended that Hutchinson was a general agent of the society. In addition to his duties as collector of the local lodge at Butte, he was superintendent of the order for the state of Montana. His duties were to institute new lodges, to visit lodges and work up an interest in the order. It is now said that in view of these facts the receipt by Hutchinson of the dues for the month of June, at a time when he knew that Kennedy was no longer a member of the order, was in fact the act of the society, and thereby the society estopped itself to claim that a forfeiture of Kennedy's membership had been effected by his failure to pay for April and May.

Sections 3091, 3092 and 3093 of the Civil Code provide:

"Sec. 3091. An agent has such authority as the principal, actually or ostensibly, confers upon him.

"Sec. 3092. Actual authority is such as the principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess.

"Sec. 3093. Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess."

There is not anything in this record to show that the society intentionally conferred upon Hutchinson authority to waive delinquency or to receive current dues after Kennedy ceased to be a member of the society; neither is there anything to show that Hutchinson believed he possessed such authority. He says: "I had no authority whatever to pass upon the application for reinstatement."

Instead of the record disclosing a course of conduct on the part of the society which allowed Kennedy to believe that Hutchinson possessed such authority, it does show by Kennedy's application for reinstatement that he knew that notwithstanding anything said or done by Hutchinson, his application had to receive the approval of the secretary of The Grand Fraternity. So far as we know from this record, this was the only instance of the kind known to the society; and, far from there being any ratification of Hutchinson's action in receiving the June dues, the order never actually received them or the delinquent dues for April or May, but immediately upon receipt of the application for reinstatement, which had indorsed upon it a statement of Hutchinson that he had in his possession the dues for April, May and June, which he held subject to the approval of the application by the secretary of The Grand Fraternity, it was disapproved by the secretary, and the money was on July 1st following tendered back to Mrs. Kennedy. The defendant offered to prove, in addition to the foregoing, that the secretary of The Grand Fraternity, on June 24th, the day he disapproved the application, wrote to Hutchinson: "You will please turn the money you are holding for Pat. Kennedy over to him at once." This offer was rejected; and, assuming that the letter was not sufficiently identified and for that reason the court's ruling was correct, still we think there is not any evidence showing or tending to show a ratification of Hutchinson's unauthorized act in taking the June dues. There is not any significance whatever

attaching to his receipt of the April and May dues, since the constitution and by-laws provide that they shall be tendered with the application for reinstatement.

In *Collins v. Metropolitan Life Ins. Co.*, 32 Mont. 329, 108 Am. St. Rep. 578, 80 Pac. 609, this court quoted with approval from *Northern Assur. Co. v. Grand View Bldg. Assn.*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, as follows: "Where waiver is relied on the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that, where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

In our view of the case, the evidence is insufficient to sustain the verdict or judgment.

The judgment and order are reversed, and the cause is remanded, with directions to the lower court to grant the defendant a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

O'TOOLE, RESPONDENT, v. COPELAND, APPELLANT.

(No. 2,472.)

(Submitted December 9, 1907. Decided December 23, 1907.)

[92 Pac. 967.]

Ejectment—Trial—Pleadings—Amendment—Evidence—Admissibility.

Trial—Pleadings—Amendment—Refusal—Error.

1. Where the district court permitted plaintiff, after commencement of trial of an action to recover real property, to amend his complaint, which, prior to amendment, stated no cause of action, it was error to refuse permission to defendant to amend her answer.

Ejectment—Evidence—Admissibility.

2. The complaint in an action in ejectment alleged ownership and right of possession, that on a certain date defendant, without plaintiff's consent, took possession of the premises, and had ever since detained the same, and that the value of the rents was \$30 a month. The answer admitted that plaintiff was the owner, but denied his right of possession, and also that defendant entered without plaintiff's consent, and the allegation as to the value of the rents. *Held*, that it was error to exclude testimony offered by defendant that she was placed in possession by plaintiff's agent under a contract of sale made with the agent. It bore upon the question of plaintiff's right to recover damages from the defendant for the use of the property, and should have been admitted.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

EJECTMENT by Mary Ann Evans O'Toole against Helen S. Copeland. Judgment for plaintiff, and defendant appeals from it and an order denying her a new trial. Reversed and remanded.

Mr. C. M. Parr, for Appellant.

An amendment to a complaint, however trivial and unimportant, authorizes defendant to put in an answer making an entirely new defense. (*Burney v. Ball*, 24 Ga. 505; *Richardson v. Richardson*, 5 Paige (N. Y.), 58; *Miller v. Whittaker*, 33 Ill. 386; *Furman v. North*, 4 Baxt. (Tenn.) 296; *Davis v. Davis*, 62 Miss. 818.) And after an amendment of a complaint in a material matter, the defendant may plead (*American Bible Society v. Hague*, 10 Paige (N. Y.), 549; *Perkins v. Hendryx*, 31 Fed. 522) to the same as if it were an original bill, no matter what may have been the state of the pleadings before the amendment was made, and he is entitled to a reasonable time for that purpose. (*Davis v. Davis, supra.*) Upon the hearing of a cause, the same indulgence will be granted to a defendant as to a plaintiff. (Story's Equity Pleading, 10th ed., sec. 902.) And if it appears that the defendant has not put in issue facts which he ought to have put in issue, he will be allowed to amend his answer for the purpose of stating those facts. (*Depue v. Sergeant*, 21 W. Va. 326; *Balen v. Mercier*.

75 Mich. 42, 42 N. W. 666.) Where the former pleading was verified, oath must be made to the truth of the proposed amendment. (*Rodgers v. Rodgers*, 1 Paige (N. Y.), 424; *Jones v. Kennicott*, 83 Ill. 484; *Huffman v. Hummer*, 17 N. J. Eq. 263.)

Where the original complaint is sworn to, an amendment which contains substantial matter, and is not a mere formal amendment, must be verified to the same extent as the original. (*Walker v. Ayres*, 1 Iowa, 449; *Rodgers v. Rodgers*, *supra*; *Whitmarsh v. Campbell*, 2 Paige (N. Y.), 66; *Kenwick v. Wilson*, 6 Johns. Ch. (N. Y.) 81; *Parker v. Grant*, 1 Johns. Ch. (N. Y.) 434; *Hill v. Hill*, 53 Vt. 578; *Semmes v. Boykin*, 27 Ga. 47.) Greater liberality is allowed to defendant to amend, than in permitting the plaintiff to amend his complaint. (*Garrison v. Goodale*, 23 Or. 307, 31 Pac. 709; *Thorn v. Smith*, 71 Wis. 18, 36 N. W. 707; *Brown v. Bosworth*, 62 Wis. 542, 22 N. W. 521.)

Mr. John J. McHatton, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

As the complaint in this case was originally drawn, it contained two causes of action, the material portions of the first of which read as follows:

“(2) That plaintiff is now, and for a long time prior to the 26th day of June, 1906, was, the owner, in possession, and entitled to the possession of the following described property, situate in Silver Bow county, Mont., to wit: Lot numbered 4, in block numbered 6, of the Ophir addition to the city of Butte, according to the plat and survey thereof now on file in the office of the county clerk and recorder of Silver Bow county, Mont., together with the buildings and improvements thereon.”

“(4) That the defendant on or about the 26th day of June, 1906, without the consent and against the will of the plaintiff, entered into and took possession of said premises, and the whole thereof, and has ever since detained, and now detains, the possession of the same from this plaintiff, and that plaintiff is entitled to the immediate possession thereof, and that she has

heretofore demanded the same. That said withholding by the defendant is without any right whatever.

"(5) That the value of the rents and the use and occupation of said premises is the sum of thirty (\$30) dollars per month, and will continue to be said sum for each and every month that the defendant withholds the possession thereof from the plaintiff; and that, by reason of the withholding thereof, the defendant has become indebted to the plaintiff, for the value of the use and occupation and of the rent of said premises, in the sum of thirty (\$30) dollars per month for each and every month since the 26th day of June, 1906, no part of which has been paid, and will become indebted to her in the further sum of thirty (\$30) dollars per month for each and every month hereafter until the rendition of judgment herein. Wherefore plaintiff prays judgment that she be adjudged to be the owner and entitled to the possession of said premises, and that she have judgment against the defendant for the sum of thirty (\$30) dollars per month for each and every month, commencing with the 26th day of June, 1906, and for costs of suit."

The defendant's answer admitted that plaintiff was, at the time of filing the answer, and for a long time prior to the twenty-sixth day of June, 1906, had been, the owner of the lot in question, but denied that "plaintiff for a long time prior to the twenty-sixth day of June, 1906, was in possession or entitled to the possession of [said lot]." The answer also denied every allegation of paragraphs 4 and 5 of said first cause of action. When the cause was reached for trial, defendant moved that the court make an order requiring plaintiff to elect upon which cause of action she would stand, and plaintiff voluntarily elected to abandon her second cause of action and stand upon the first, whereupon defendant objected to the introduction of any evidence by the plaintiff, for the reason that the complaint did not state facts sufficient to constitute a cause of action. The following proceedings then took place: "The Court: Let me see the complaint. Do you claim this to be an action in ejectment? Mr. McHatton: Yes, your honor, this is an action in

ejectment. And I want to say that in the second paragraph there is a mistake, which we will ask the court for permission to correct. The complaint should have read: 'That the plaintiff is now, and for a long time prior to the 26th day of June, 1906, was, the owner and entitled to the possession, and in possession up to said date.' Mr. Parr: We object to the amendment desired, and state that we are here to meet the allegations of the complaint. This is a material allegation and should be made under oath. The Court: It is very apparent a mistake, and, on application of the plaintiff, the complaint will be allowed to be amended by striking out the words— Mr. McHatton: That the plaintiff is now, and for a long time prior to the 26th day of June, 1906, was, the owner, after the word 'owner' strike out 'in possession,' and then, after the word 'possession' on the third line, insert 'and in possession up to said date.' "

Thereupon counsel for the defendant said to the court that, as he had interpreted the complaint prior to the amendment, the pleader had attempted to state a cause of action for unlawful entry and detainer, such as would preclude the defendant from pleading a counterclaim for damages, but, as the complaint had been amended so as to state a cause of action in ejectment, he asked leave to amend his answer; and he tendered a proposed amended answer, reading as follows: "The defendant, amending her answer by leave of court, alleges as for a counterclaim against the plaintiff: (1) That at all the times herein-after named Mary Ann Evans O'Toole was the legal owner of lot four (4), in block six (6), of the Ophir addition to the city of Butte, and that all of the said times A. A. Gagner was the agent and representative of the said Mary Ann Evans O'Toole.

"(2) That on or about the 1st day of January, 1906, the defendant and plaintiff O'Toole, through her agent, Gagner, made and entered into a contract for a valuable consideration, wherein and whereby said plaintiff O'Toole promised and agreed to sell and convey to defendant free from incumbrance lot four (4), in block six (6), of the Ophir addition to the city of Butte, and that the price agreed upon for said lot was eleven hundred

(\$1,100) dollars, and defendant agreed to pay to the plaintiff O'Toole, through her said agents, the sum of eleven hundred (\$1,100) dollars, and that on or about the 12th day of January, 1906, defendant paid to the said agent of said O'Toole the sum of fifty (\$50) dollars as a part of the purchase price for said lot, and that said O'Toole accepted said sum of money as part of the purchase price.

"(3) That thereafter, and on the 3d day of February, 1906, defendant paid to plaintiff through her said agents the further sum of two hundred and fifty (\$250) dollars, as part of the purchase price for said lot.

"(4) That on or about the 1st day of June, 1906, the said defendant tendered the balance of said purchase price to wit, the sum of eight hundred (\$800) dollars, to said plaintiff, through her agents, and demanded of said plaintiff, through her said agents, a good and sufficient deed for said property, and that said property be transferred free from incumbrance, but that said plaintiff refused to accept said sum of eight hundred (\$800) dollars, and refused to transfer the said property free from incumbrance, and refused to deliver to defendant a good and sufficient deed therefor.

"(5) That defendant has done everything on her part necessary to be done and performed, and that at the time of entering into said contract the possession of said property was given to defendant by said plaintiff's agent, and that she entered into the possession thereof, and caused to be expended in improving said property the sum of about three hundred and fifty (\$350) dollars.

"(6) That said defendant is damaged to the extent of three hundred and fifty (\$350) dollars by reason of the improvements placed upon said property.

"(7) That since the defendant entered into the said contract for the conveyance of said lot free from incumbrance with the plaintiff that the said property has increased in value in the sum of five hundred (\$500) dollars.

"(8) That defendant is now ready and willing, and at all times since the tender of said balance of purchase price of \$800 has been ready and willing, to pay to said plaintiff O'Toole said \$800, and will at all times henceforth be ready and willing to pay said balance of the purchase price of \$800 upon the delivery of said deed.

"Wherefore defendant prays judgment: First. That a decree of this court be entered compelling said plaintiff O'Toole to transfer to this defendant the said property, to wit, lot four (4), in block six (6), of the Ophir addition to the city of Butte, free from incumbrance, by a good and sufficient deed, upon the payment by defendant to said plaintiff O'Toole of the sum of \$800, unless the said plaintiff make the said transfer within ten (10) days after the entry of said decree, and the payment of said \$800 as aforesaid, that the clerk of this court be appointed a commissioner thereof to make, execute, and deliver to plaintiff a good and sufficient deed for said property, and that if the said property cannot be transferred free from incumbrance that the said defendant have and recover from the said plaintiff the sum of three hundred (\$300) dollars, paid to the said plaintiff by said defendant as part of the purchase price of said property, together with interest thereon at the rate of eight per cent (8 per cent) from the 3d day of February, 1906, and for the further sum of three hundred and fifty (\$350) dollars, the money expended upon said property for the improvements thereon, and the further sum of five hundred (\$500) dollars the increase in value of said property since the entering into of said contract between the defendant and plaintiff, with interest at eight per cent (8 per cent) from the date of tender of \$800 upon said last two amounts. And for such other and further relief as to the court may seem meet and equitable, together with defendant's costs." The court denied the request, and the defendant saved an exception to the ruling.

Thereafter the plaintiff introduced evidence tending to show that defendant was and had been in possession of the premises since June 26, 1906, and the rental value of the use thereof, by

the month, for the period of her occupancy. The defendant then offered to show by witnesses that she was placed in possession of the premises by plaintiff's agent, under the contract set forth in the proposed amendment to the answer. Defendant's counsel stated at the time that he offered the evidence to show that there was no unlawful entry or forcible detention of the property by defendant. The court said: "This not being an action of unlawful entry or forcible detainer, it would not be material and I will sustain the objection."

The testimony being closed, the court directed the jury as follows: "You are instructed to return a verdict herein in favor of the plaintiff and against the defendant, finding that the plaintiff is now, and was at the time of the commencement of this action, the owner of the property described in the complaint, and entitled to the possession thereof; and, in addition thereto, for such sum of money as the evidence shows was the rental value of the premises from the time the defendant entered into possession of the same up to the present time." The jury returned the following verdict: "We, the jury in the above-entitled cause, find that the plaintiff is now, and was at the time of the commencement of this action, the owner and entitled to the possession of the premises described in the complaint, and that the defendant entered into and took possession thereof. We further find a verdict in favor of the plaintiff and against the defendant for the sum of \$177.35." Judgment was entered upon this verdict, and from that judgment and an order refusing a new trial the defendant has appealed to this court.

We think the court misinterpreted the offer of proof made by the defendant. As we understand the language of her counsel, he used the words "unlawful entry" and "forcible detainer" in their popular sense, and offered the evidence as bearing on the plaintiff's right to recover damages for the use of the premises. We think it makes very little, if any, difference whether the pleader attempted to state a cause of action in ejectment or forcible entry and detainer in the original complaint. The fact is that he stated no cause of action. When

the plaintiff so amended her complaint as to state a cause of action, we are of opinion that the trial court should, under the circumstances disclosed by this record, have allowed the defendant to amend her answer. We think, also, that the court erred in refusing to allow the defendant to introduce the testimony above referred to, under the denials of her original answer. It bore upon the question of the plaintiff's right to recover damages for the use of the property by the defendant.

The judgment and order appealed from are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

FERGUSON, APPELLANT, v. PARROTT, RESPONDENT.

(No. 2,465.)

(Submitted December 6, 1907. Decided December 23, 1907.)

[92 Pac. 965.]

*Appeal—Proceedings Anterior to Judgment—Motion to Set
Aside Judgment—Mistake—Surprise—Excusable Neglect—
District Court—Discretion—Review.*

Appeal—Proceedings Anterior to Judgment—How Reviewable.

1. Since proceedings had anterior to judgment can be reviewed only on appeal from the judgment or an order denying a new trial, the action of the district court in proceeding with the trial of a civil cause to judgment, after plaintiff had orally asked for a postponement on account of the absence of her attorney, instead of dismissing the action for want of prosecution, was not reviewable on appeal from an order denying plaintiff's motion to set aside the judgment on the ground of mistake, surprise or excusable neglect.

Same—Motion to Set Aside Judgment—Mistake, etc.—Discretion—Review.

2. A motion to set aside a judgment on the ground of mistake, surprise or excusable neglect, being addressed to the discretion of the court, an order refusing such a motion will not be reversed on appeal, where no complaint is made that such discretion had been

abused in passing upon the affidavits filed in support of the motion and those against it, and where no reference is made in appellant's brief to them, the errors relied on being such as were not reviewable on an appeal from an order of this kind.

Appeal from District Court, Deer Lodge County; W. E. C. Stewart, Judge.

ACTION for malicious prosecution, by Arlington Ferguson against George Parrott. Judgment for defendant. From an order denying a motion to set the same aside, on the ground of mistake, etc., plaintiff appeals. Affirmed.

Mr. C. M. Parr, for Appellant.

Messrs. Trippett & Stewart, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for malicious prosecution. The issues having been made up, the plaintiff filed with the clerk her affidavit alleging that she could not have a fair and impartial trial before the Honorable George B. Winston, the resident and presiding judge, by reason of his bias and prejudice. No motion was made to change the place of trial. On October 2d an order was made setting the cause for trial on October 10th, at 9:30 A. M. In the meantime, the presiding judge called in the Honorable W. R. C. Stewart, of the ninth district, to assume jurisdiction and preside at the trial. At the appointed hour the plaintiff was present with her witnesses. Her attorney, John A. Coleman, Esq., was absent. The defendant was also present with his witnesses, and demanded that the trial proceed, notwithstanding the absence of plaintiff's attorney. So far as the record shows, the plaintiff made no formal application to the court for a postponement of the trial, but contented herself by stating that her attorney was not present, and that she desired a postponement until she could secure his presence. In the absence of some showing by affidavit the court refused to

grant the postponement, and ordered the trial to proceed. Thereupon a jury was impaneled. The plaintiff declined to offer any evidence. The defendant having introduced witnesses, the court directed a verdict for the defendant, and judgment was entered accordingly. On February 15, 1907, the plaintiff moved the court to set aside the judgment on the ground of mistake, surprise, and excusable neglect. The appeal is from the order denying this motion.

The certificate of the judge attached to the bill of exceptions is somewhat informal and indefinite, in that it fails to state specifically that the bill "is allowed," as provided in section 1155 of the Code of Civil Procedure, and, at the hearing, objection was made to a consideration of it on that ground. We shall not notice this objection. Assuming that the certificate is in all respects in substantial compliance with the statute, there is no merit in the appeal.

It is argued by counsel for plaintiff that the judgment should have been set aside on the ground that, instead of dismissing the cause at the cost of the plaintiff for want of prosecution, which should have been done (Code Civ. Proc., sec. 1004), the court proceeded to call a jury, to hear evidence on the part of defendant, to direct a verdict in his favor, and to render a judgment thereon, thus concluding the case on the merits. Conceding that the course pursued by the court in the disposition of the case was erroneous, the questions argued in this connection do not properly arise on this appeal, and therefore may not be determined. All of them relate to the regularity of the proceedings in the case anterior to the judgment, and their propriety may not be reviewed except on appeal from the judgment or an order denying a new trial.

The motion to set aside the judgment was made under section 774 of the Code of Civil Procedure, and was addressed to the discretion of the court, upon the showing made in support of it. Plaintiff filed her own affidavit, setting out in detail facts explanatory of the absence of her attorney, and tending to show that she was not at fault in failing to make a formal applica-

tion for a postponement in order to secure the attendance of her attorney or procure another. The defendant filed counter-affidavits. The merits of the motion depended upon the showing thus made. The result was a special order after final judgment, the force of which depended upon the circumstances shown at the time. Evidently the presiding judge was of the opinion that the motion was without substantial merit. However this may have been, there is no reference in the brief of counsel to these affidavits. No complaint is made that the court abused its discretion in any manner in its decision upon them, reliance in this court being exclusively upon the alleged errors committed anterior to the judgment. Under these circumstances we must conclude that counsel was satisfied with the action of the court in the use of its discretionary power in determining that there was no proof of mistake, surprise, or excusable neglect, and hence chose to rely upon the errors of law assigned and discussed in the brief. A disposition of these questions would be the result of a review of matters entirely outside of the record before us.

Whether the result of the court's action was a judgment upon the merits is a question upon which we may not express an opinion, because this would be to anticipate and determine a controversy which may arise in another suit brought upon the same cause of action involved herein.

For the reasons stated, the order must be affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

**NORTH REAL ESTATE LOAN & TITLE CO., APPELLANT,
v. BILLINGS LOAN & TRUST CO., RESPONDENT.**

(No. 2,466.)

(Submitted December 7, 1907. Decided December 23, 1907.)

[98 Pac. 40.]

*Quieting Title—City Lots—Tax Sales—Sale en Masse—Tax
Deeds—Invalidity—Equity Cases—Disposition of, on Appeal.*

**Tax Sales—Noncontiguous City Lots—Sale en Masse—Tax Deed—In-
validity.**

1. A tax deed to property assessed and sold under the provisions of the Fifth Division, Revised Statutes, 1879, the recitals in which showed that a number of noncontiguous city lots were sold *en masse*, was void upon its face and inadmissible in evidence in a suit to quiet title.

Equity Cases—Disposition of, on Appeal.

2. Where the supreme court, on appeal in an equity case, reverses the judgment, but no cause appears why a new trial or the taking of further testimony should be ordered, it will, under the provisions of the Act of 1903 (Laws 1903, Second Extra. Session, p. 7), enter a judgment finally determining the cause.

*Appeal from District Court, Yellowstone County; Sydney
Fox, Judge.*

ACTION by the North Real Estate Loan and Title Company against the Billings Loan and Trust Company and others. From a judgment in favor of the Billings Loan and Trust Company, and from an order denying it a new trial, plaintiff appeals. Reversed and remanded.

Mr. T. S. Hogan, and Mr. M. J. Lamb, for Appellant.

In the absence of statutory provisions to the contrary, neither a tax deed nor its recitals are evidence against the owner of the regularity of any of the proceedings leading up to the tax sale, nor antecedent to the execution of the tax deed. (*Norris v. Russell*, 5 Cal. 249; *Cooley on Taxation*, 326, 354.) And the common-law rule applies, that one who claims under a tax sale takes upon himself to show, affirmatively, that the tax was duly

assessed and was a lien on the lands, and that the successive steps which led to the sale were regularly taken. (*Woolbridge v. State*, 43 N. J. L. 262.) The effect of a tax deed as evidence is determined by the law in force at the date of the sale. (*Nelson v. Rountree*, 23 Wis. 367; *Capital State Bank v. Lewis*, 64 Miss. 727, 2 South. 243; *Woodman v. Clapp*, 21 Wis. 355; *State v. Mantz*, 62 Mo. 258; *Cornelius v. Ferguson*, 16 S. Dak. 113, 91 N. W. 460; *Blackburn v. Lewis*, 45 Or. 422, 77 Pac. 746; *Eastern Carolina Lumber & Mfg. Co. v. State Board of Education*, 110 N. C. 35, 7 S. E. 573.) The Montana statute which makes a tax deed *prima facie* evidence of the transfer of the title of the delinquent, had not been passed when the tax sale here was made. That statute applies only to deeds, executed upon a sale, for taxes subsequently levied. This is the construction placed upon a similar California law, in *Keane v. Cannovan*, 21 Cal. 291, 82 Am. Dec. 738.

Mr. James R. Goss, and *Mr. W. M. Johnston*, for Respondent.

Plaintiff, having pleaded a tender of all the delinquent taxes, penalties, costs, charges and interest, thereby acknowledged that all necessary antecedent steps had been taken. One who pleads, in a suit to obtain relief from a tax deed, a tender of the amount paid by the purchaser for his tax deed, cannot contest the validity of the tax for the nonpayment of which the premises are sold, the tender being an admission of all the facts necessary to be pleaded to make out plaintiff's cause of action. (*Hines v. Cottle*, 143 Mass. 310, 9 N. E. 654; *Currier v. Jordan*, 117 Mass. 260; *Bacon v. Charlton*, 7 Cush. 581; *Conklin v. Cullen*, 29 Mont. 38, 74 Pac. 72; *Wells v. Missouri-Edison Electric Co.*, 108 Mo. App. 607, 84 S. W. 204; *Frink v. Coe*, 4 G. Greene (Iowa), 555, 61 Am. Dec. 141; *Cobbey v. Knapp*, 23 Neb. 579, 37 N. W. 485; *Martin v. Whisler*, 62 Iowa, 416, 17 N. W. 593; *Rump v. Schwartz*, 56 Iowa, 611, 10 N. W. 99.) A plea of tender prevents the defendant from moving in arrest of judgment when plaintiff's petition does not state a cause of action. (*Wilson v. Chicago etc. Ry.*, 68 Iowa, 673, 27 N. W. 916; *Fox*

v. *Williams*, 92 Wis. 320, 66 N. W. 357.) A tax deed is not invalid because it conveys a number of lots or parcels of land. (Mont. Rev. Stats. 1879, sec. 1039; *Waddingham v. Dickson*, 17 Colo. 223, 29 Pac. 177; *Crisman v. Johnson*, 23 Colo. 264, 58 Am. St. Rep. 224, 47 Pac. 296; *Dodge v. Emmons*, 34 Kan. 732, 9 Pac. 951; *Bennett v. Darling*, 15 S. Dak. 1, 86 N. W. 751; *Towle v. Holt*, 14 Neb. 221, 15 N. W. 203; *Gibson v. Shiner*, 74 Kan. 728, 88 Pac. 259; *Cartwright v. Korman*, 45 Kan. 515, 26 Pac. 48.)

MR. JUSTICE SMITH delivered the opinion of the court.

The above-named plaintiff, a corporation, alleges in its complaint that it is the owner and in possession of lots 5 and 6, in block 52, of the city of Billings; that it has title in fee to the lots, and that the defendants, naming several, claim an estate therein adverse to it, which claims are without any legality. The prayer is that plaintiff be declared to be the owner of the lots, that the defendants be adjudged to have no right or title thereto, and that they be enjoined from asserting any claim thereto adverse to plaintiff. The Billings Loan and Trust Company, a corporation, was the only answering defendant. After denying the material parts of the complaint, it alleged affirmatively that it is the owner of the lots in question by virtue of a certain tax deed. The successive steps leading up to the issuance of the deed to one of the defendant's predecessors in interest are pleaded. Plaintiff by replication denies the validity of this tax deed, for the reasons, among others, "that it is void upon its face, and is of no force or effect whatever, and did not convey any right, title, or interest in or to said lots, or any of them to the defendant, * * * or any other person whomsoever." Other objections to the deed were raised, but we do not find it necessary to consider them.

The district court made findings of fact and conclusions of law in favor of the defendant, and entered a decree in accordance with the conclusions of law and the prayer of defendant's answer. The plaintiff thereafter made its motion for a new

trial, which motion was overruled, whereupon it appealed from the judgment or decree and from the last-mentioned order.

It appears from the bill of exceptions that, after the plaintiff had shown its chain of title by mesne conveyances through the Northern Pacific Railroad Company, the Minnesota and Montana Land and Improvement Company, F. T. Robertson and wife, and Austin North Company to itself, it rested its case. Thereupon defendant offered in evidence a county treasurer's tax deed, which reads as follows:

"Know all men by these presents that whereas, the following described real property, to wit: Lots 20, 21, and 22 in block 6; lots 5 and 6 in block 52; lots 18 and 19 in block 53, city of Billings, situated in the county of Yellowstone, and Territory of Montana, was subject to taxation for the year A. D. 1886, and, whereas, the taxes assessed upon said real property for the year or years aforesaid, remained due and unpaid at the date of the sale hereinafter named;

"And whereas, the treasurer of said county did, on the 25th day of February, A. D. 1887, expose at public sale, at the court house, in the county aforesaid, in substantial conformity with all the requirements of the statute in such case made and provided, the real property above described, for the payment of the taxes, interest and cost then due and remaining unpaid on said property; and whereas, at the time and place aforesaid, Jas. R. Goss of the county of Yellowstone, and Territory of Montana, having offered the sum of eight dollars and 57 cents, being the whole amount of taxes unpaid on said property, which was the least quantity bid for, and payment of such sum having been made by him to the said treasurer, the said property was stricken off to him at that price; and whereas, the time of redemption having elapsed since the date of said sale, and the said property has not been redeemed therefrom as provided by law;

"Now therefore, I, A. S. Douglas, treasurer of the county aforesaid, for and in consideration of the sum, to the treasurer paid as aforesaid, and by virtue of the statute in such case

made and provided, have granted, bargained, and sold, and by these presents do grant, bargain and sell unto the said Jas. R. Goss, his heirs and assigns, the real property last here described. To have and to hold unto him the said Jas. R. Goss, his heirs and assigns, forever.

"In witness whereof, I, A. S. Douglas as aforesaid by virtue of authority aforesaid as aforesaid, have hereunto subscribed my hand on the seventh day of May, A. D. 1888.

"A. S. DOUGLAS,

"County Treasurer."

To the introduction of this deed in evidence the plaintiff's counsel interposed the following objection: "That it is a deed to a private individual, and not to the county, and shows that three separate noncontiguous pieces of property are included therein, and in the recitals thereof it appears that the three parcels were sold together, and that the whole of said three tracts of land were purchased as the least quantity bid for." The court overruled the objection, and admitted the deed in evidence. Thereupon defendant introduced in evidence, over plaintiff's objection, a deed from Jas. R. Goss and wife to Albert Carswell, a deed from Carswell to Wm. Read, and a deed from Read and wife to the defendant, all purporting to convey lots 5 and 6 in block 52, and, after one Burton had testified that the property was vacant and unoccupied, rested its case. There was no rebuttal testimony, and the plaintiff thereupon asked for a judgment in its favor "for the reason that the defendant has failed to make any defense to the action." This motion was denied and a decree entered for the defendant, as before stated. No evidence as to adverse possession or abandonment was offered at the trial, and the question of laches is not discussed in the briefs, and was not touched upon in the argument.

The property in question was assessed for taxes by virtue of the provisions of Revised Statutes of Montana, 1879, Fifth Division. A reference to those statutes discloses the following provisions:

"Sec. 1001. Every tax levied under the provision of this chapter is hereby made a lien against any and all the property assessed, and such lien shall attach at the time of such assessment, and shall not be satisfied or removed until such taxes are paid."

"Sec. 1004. Every inhabitant of this Territory, of full age and sound mind, shall list all property subject to taxation in this Territory of which he is the owner," etc.

"Sec. 1011. The district assessors of each county shall assess and value all property required by the provisions of this article to be assessed and valued, and between the first day of February and the tenth day of September in each year, shall demand of each tax payer in his district a list, as hereinafter provided, of his, her, or their property," etc.

"Sec. 1013. The list shall contain: First: His, her, or their lands, to be designated by township, range, section, and any division or part of section; and where such part is not a government division or subdivision, then some other description to identify it; and his town lots, naming the town in which they are situated, and their proper description, by number and blocks, or otherwise, according to the system of numbering in the town.

"Sec. 1014. Before proceeding to assess any property under the provisions of this article, it is hereby made the duty of the assessor to administer to the person about to be assessed the following oath or affirmation: [Giving form of oath.] And to ask him, among other questions, the following: How many town lots do you own? Where are they? Describe them.

"Sec. 1015. On or before the tenth of September, annually, the assessor shall make out and deliver to the county clerk an assessment-roll, containing in tabular form and alphabetical order, the names of the persons and bodies in whose names property has been listed in his district, with the several species of property and the value, as hereinbefore indicated, with the columns of numbers and value footed," etc.

"Sec. 1030. The treasurer shall give notice of the sale of real property. * * * Such notice shall contain a notifica-

tion that all lands on which the taxes of the preceding year or years, naming it, have not been paid, will be sold, and the time and place thereof, *with a list of the lands,*" etc.

"Sec. 1035. The county treasurer shall make out, sign and deliver to the purchaser of any real property sold for the payment of taxes as aforesaid, a certificate of purchase, describing the property on which the taxes and costs were paid by the purchaser, as the same was described in record of sales, and also how much and what part of each tract or lot was sold, and stating the amount of each kind of tax, interest and costs, for each tract or lot for which the same was sold, as described in record of sales, and that payment has been made therefor. If any purchaser shall become the purchaser of more than one parcel of property, he may have the whole included in one certificate."

"Sec. 1037. Real property sold under the provisions of this article may be redeemed at any time before the expiration of one year from the date of the sale, by the payment to the treasurer of the proper county, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and subsequent taxes," etc.

"Sec. 1038. The county treasurer shall, upon application of any party to redeem any real property sold under the provisions of this article, and being satisfied that such party has the right to redeem the same, and upon the payment of the proper amount, issue to such party a certificate of redemption, setting forth the facts of the sale, substantially as contained in certificate of sale," etc.

"Sec. 1039. Immediately after the expiration of the time allowed for the redemption of any land sold for taxes under the provisions of this article, the treasurer then in office shall make out a deed for each lot or parcel of land sold and remaining unredeemed, and deliver the same to the purchaser upon the return of the certificate of purchase; * * * any number of parcels of land bought by one person, may be included in one deed, as may be desired by the purchaser."

Section 1040 provides a form of tax deed, of which the one received in evidence in this case is a substantial copy.

It will be seen from the foregoing quotations that at the time these lots were assessed and sold for taxes, the law required that the owner should furnish to the assessor a list of his property; and, in case of town lots, that he should name the town in which they were situated, and give a proper description thereof by number and blocks, and that from the lists so obtained the assessor should make out an assessment-roll containing the names of the persons who had listed property in his district, together with the several species of property and the value thereof.

The legislature of 1887 passed a law providing that "each tract of land, and each town or city lot, shall be valued and assessed separately, except when one or more *adjoining* tracts or lots are returned by the same person, in which case they may be valued and assessed jointly." (Comp. Stats. 1887, Fifth Div., sec. 1696.) The supreme court of California in the case of *Terrell v. Groves*, 18 Cal. 149, said this: "The Act of April, 1857, under which these proceedings were taken, in the fourth section provides that the assessor shall set down in his assessment-book (1) the names of all taxable inhabitants; (2) all real estate and improvements on public lands taxable to each, giving the metes and bounds, or describing by lots or fractions of lots; (3) the cash value of all improvements on real estate, etc. We think the true meaning of the provision is to require a separate assessment and valuation of each lot in cases like this of city property. If a man owned a hundred lots, or if, after the assessment, he sold some of them, and it became necessary or desirable to pay the taxes on a part of the property, it would be impossible to do so without paying the full amount assessed. It was evidently the intention of the statute that each lot should be made to bear its own portion of the public burdens, and a great deal of confusion and injustice would grow out of a gross assessment of several lots, and a sale in gross for the payment of the general tax. This construction seems to be given to the provisions of statutes not very dissimilar in Maine and Ohio

(*Shimmin v. Inman*, 26 Me. 228, and *Willey v. Scoville's Lessee*, 9 Ohio, 43), and we think it warranted by the language of our own Act."

We are of opinion that the passage of section 1696, *supra*, by the legislature of 1887, added nothing to the duties of the assessor as the same were indicated by the provisions of the Revised Statutes of 1879, above quoted.

In the case of *Casey v. Wright*, 14 Mont. 315, 36 Pac. 191, the court said: "In *Terrill v. Groves*, 18 Cal. 149, a case very similar to the one under consideration, the court says: 'The plaintiff claims under a tax deed. It seems that these lots were assessed as the property of one Alonzo Green. They were separately listed, but valued jointly, and the aggregate tax on all of them, and two other lots in other blocks, set down. The lots sued for were contiguous to each other, and formed a part of block No. 28 on the plan of the city. These lots were put up and sold together for the aggregate amount of this tax. The appellants contend that this was illegal, and that the sale and the consequent deed were void; and we are of the same opinion.' We think the authorities are almost unanimous that such a sale is void."

In the case of *Emerson v. Shannon*, 23 Colo. 274, 58 Am. St. Rep. 232, 47 Pac. 302, the court said: "The defendant, to maintain his title at the trial, offered in evidence a tax deed purporting to convey lands sold for delinquent taxes *en masse* for a gross sum, viz.: [Here follows description of the land.] We have just held in the case of *Crisman v. Johnson*, 23 Colo. 264, 58 Am. St. Rep. 224, 47 Pac. 296, that under our statute it is lawful for the authorities to assess and sell *en masse*, for delinquent taxes, a number of town lots. Section 3822, Mills' Annotated Statutes, provides for such assessment if the lots are listed by the same person; and section 3894 provides that, 'when * * * adjoining lots are offered as the property of the same person, one or more may be sold for the taxes of all.' It is not necessary to determine whether, when all our statutes on the subject are considered, it is permissible to sell for taxes several tracts of

contiguous acre property, as such a case is not presented, as the description given of the several tracts in the treasurer's deed will only apply to lands that are not contiguous, but widely separated and in different townships. It shows that these non-contiguous tracts were sold together for a gross sum. When this instrument was offered in evidence for the purpose of showing title in the defendant, the court properly rejected the same. The authorities are uniform that such a deed is absolutely void."

In the case of *Speed v. McKnight*, 76 Miss. 723, 25 South. 872, the court said: "The assessment under which this property was sold and the sale were utterly void. * * * The assessment here was the act of the sheriff, and the lots were physically widely separated and of different values, as shown by proof, and should not have been sold as one tract."

In the case of *National Bank of Augusta v. Baker Hill Iron Co.*, 108 Ala. 635, 19 South. 47, this language is found: "There can be no sort of doubt that the tax sale and deed under which plaintiff claims were absolutely void, for the reason that the assessment and sale were not made in compliance with the statutory requirements. * * * The assessment in question * * * embraced a great many pieces of property, none of which were valued separately, as required by section 33 of the Act, but all were assessed at one gross valuation. * * * Finally, the property was not offered for sale by sections or parts of sections, as required by section 79, but was sold *en masse*, though there were many different and disconnected subdivisions of sections."

In *Cocks v. Simmons*, 55 Ark. 104, 29 Am. St. Rep. 28, 17 S. W. 594, it was said: "By the recitals of the deed four sections of land severally assessed were sold in a body for the sum of the taxes due upon all. Each section was thereby sold for the taxes due upon each of the others, as much as for the taxes due upon it. Such a sale is absolutely void, for the collector has no more authority to sell one tract of land for a tax due upon another than for a store account or other ordinary debt."

In *Cornelius v. Ferguson*, 16 S. Dak. 113, 91 N. W. 460, it was said: "But the deed, when read in connection with the eighth finding of fact, is clearly shown to be void, as the court in the latter finding finds that the lots for the year 1889 were sold in bulk for the gross sum of \$59.55. Reading, therefore, the two findings together, the court was clearly right in its conclusions of law that the tax deed was void on its face."

The supreme court of Iowa, in *Ackley v. Sexton*, 24 Iowa, 320, used this language: "This tax deed was void upon its face, because it embraced several distinct tracts of land, which purported to have been sold *en masse* for a gross sum. It was precisely such a deed as has been adjudged void on its face by prior decisions of this court."

Judge Cooley, in his work on Taxation (second edition), page 493, thus expresses his views on the subject under consideration: "To group lands in the sale which are assessed as separate interests is incompetent, even though they be owned by the same person. Each parcel is chargeable with its own taxes, and is to be redeemed by paying them; but such a joint sale charges it with tax upon the other also, and is like issuing one execution upon several judgments, and selling jointly the lands which are charged with separate liens. It may or may not be important to the owner that he have the opportunity of a separate redemption, but the fact that it possibly may be so is sufficient reason why the law should protect the right." (See, also, *Cartwright v. McFadden*, 24 Kan. 662; *Wyer v. La Rocque*, 51 Kan. 710, 33 Pac. 547; *Weeks v. Merkle*, 6 Okla. 714, 52 Pac. 929; *Lowenstein v. Sexton*, 18 Okla. 322, 90 Pac. 410; *Barnes v. Boardman*, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785; *Gibson v. Kueffer*, 69 Kan. 534, 77 Pac. 282.)

In reply to the contention of the appellant, counsel for the respondent calls attention to section 1039 of the Revised Statutes of 1879, *supra*, which provides that any number of parcels of land bought by one person may be included in one deed, if the purchaser so desires, and numerous cases are cited from other states to uphold this proposition. Under the statute, there is no

doubt that a deed would not be invalid because it conveys a number of lots or parcels of land; but it is equally clear to us that, where a deed shows on its face that several noncontiguous parcels of property were sold *en masse*, the deed is void.

The deed received in evidence in this case shows, on its face, that certain lots in blocks 6, 52, and 53, in the city of Billings, were assessed together, and that they were sold *en masse* for \$8.57. We know, of course, that blocks in cities and towns are bounded by streets and alleys, and it therefore follows that the lots in these different blocks could not be adjoining lots. As was indicated by the supreme court of California and also by Judge Cooley, *supra*, the object of the statute undoubtedly was to provide that the officers' books should show the tax which attached as a lien to each separate lot, piece or parcel of land, so as to enable the owner, or his successor in interest, to redeem any one lot by paying the tax thereon without any obligation to pay the tax on other lots in order to clear the title to the particular lot. It seems to us that this is a reasonable right or privilege secured to the owner, and that the courts have properly by their decisions recognized and protected the same.

We hold that the tax deed received in evidence in this case is void on its face, and ought not to have been considered by the trial court.

This being an equity case, and no cause appearing why a new trial or the taking of further evidence should be ordered, it is our duty to finally determine the same. (Code Civ. Proc., sec. 21, as amended by the legislature in Acts, 2d Leg. Extra. Sess. 1903, Chap. 1, p. 7.) It is therefore directed that the judgment and order appealed from be, and the same are hereby, reversed, and the cause is remanded to the district court of Yellowstone county, with instructions to enter a judgment in favor of the plaintiff in accordance with the prayer of its complaint.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied January 17, 1908.

36 368
139 357

EISENHAUER, RESPONDENT, v. QUINN, SHERIFF, ET AL., APPELLANTS.

(No. 2,464.)

(Submitted December 6, 1907. Decided December 23, 1907.)

[93 Pac. 38.]

Realty—Fixtures—Chattels—Claim and Delivery—Purchase for Value—Estoppel—Injunction—Pleadings—Complaint.

Fixtures—Real Property—Wrongful Attachment to—Effect of Deed—Innocent Purchaser.

1. Where one tortiously attaches to his land the house of another, then a chattel, by placing it upon a stone foundation, such house does not thereby become a part of the realty of the tort-feasor; hence, title to the house, good as against the original owner thereof, cannot be acquired by deed of the land with its appurtenances and improvements.

When Chattels Become Fixtures.

2. A chattel, to become an irremovable fixture, must have been annexed to the realty by the owner of the fixture, or with his consent.

Chattels—Fixtures—Realty—Claim and Delivery.

3. Where one wrongfully attaches to his realty another's chattels, and without the latter's knowledge or consent, such chattels may be reclaimed in an action in claim and delivery, if they can be identified.

Same—Wrongful Attachment to Realty—Purchaser for Value—When Defense not Available.

4. In the absence of statute, the defense of purchase for value and without notice is not available against the holder of the legal title; therefore, the person who claimed to have bought the house, referred to in paragraph 1, above, from the party who had tortiously attached it to his land and, thus, had not any title at all,—could not interpose such defense to the claim of the rightful owner.

Purchaser for Value—When Defense Available.

5. *Obiter*: The defense of purchase for value and without notice may be interposed only as against the holder of an equitable title.

Estoppel—Pleadings.

6. Since, to be available as a defense, estoppel must be pleaded, defendant in the action mentioned above, who failed to so plead, though he had ample opportunity so to do, could not rely upon that defense.

Pleadings—Injunction—Complaint—Requisites.

7. Plaintiff in his complaint for an injunction restraining a sheriff from removing a house, theretofore adjudged in an action in claim and delivery to belong to one from whom it had been wrongfully taken, attached to the tort-feasor's land and later by him sold to plaintiff, simply alleged that he had no plain, speedy or adequate remedy at law. He failed to state that the sheriff was insolvent, or that his official bond was insufficient; nor was there an allegation

that the injury which would be occasioned to plaintiff by removal of the house, could not be compensated in damages. *Held*, that in the absence of such allegations, the complaint failed to state a cause of action for an injunction.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

Suit for injunction by John Eisenhauer against John J. Quinn, as sheriff of Silver Bow county, and Tony Gerarci, intervener. From a decree in favor of plaintiff and an order denying them a new trial defendant and intervener appeal. Reversed and remanded.

Mr. M. P. Gilchrist, and Mr. W. D. Kyle, for Appellants.

A chattel to be an irremovable fixture must have been annexed by the owner thereof. (Bronson on Fixtures, 73; 13 Encyclopedia of Law, 2d ed., 604; *Cochran v. Flint*, 57 N. H. 514; *Shoemaker v. Simpson*, 16 Kan. 43; *Central Branch R. R. Co. v. Fritz*, 20 Kan. 430, 27 Am. Rep. 175; *Michigan Mut. L. Ins. Co. v. Cronk*, 93 Mich. 49, 52 N. W. 1035; *Page v. Urick*, 31 Wash. 601, 96 Am. St. Rep. 924, 72 Pac. 454; *March v. McKoy*, 56 Cal. 85.) A person cannot be divested of his title to property without his consent. (*Adams v. Tully*, 164 Ind. 292, 73 N. E. 595; *Churchill v. More* (Cal. App.), 88 Pac. 290; *Lorain Steel Co. v. Norfolk etc. Ry. Co.*, 187 Mass. 500, 73 N. E. 646; 19 Cyc. 1057.)

"One cannot be a *bona fide* purchaser of stolen property within the meaning of the law." (Shinn on Replevin, sec. 278.) The doctrine of innocent purchaser is only applicable where the one invoking it is clothed with the legal title and not a mere equity. (24 Am. & Eng. Ency. of Law, 1169; *Anketel v. Convers*, 17 Ohio St. 11, 91 Am. Dec. 115; *Sampeyreac v. United States*, 7 Pet. 222, 8 L. Ed. 665; see, also, *Parish v. Morey*, 40 Mich. 417; *Barstow v. Savage M. Co.*, 64 Cal. 391, 49 Am. Rep. 705, 1 Pac. 349; *Klein v. Seibold*, 89 Ill. 540; *Wilson v. Crocket*, 43 Mo. 216, 97 Am. Dec. 389; *Sherburne v. Strawn*, 52 Kan. 39, 34 Pac. 405.)

Mr. E. M. Lamb, for Respondent.

The property in controversy was real property in the eyes of the law, and a *bona fide* purchaser without notice is entitled to rely upon the record title. (*Murray v. Lylburn*, 2 Johns. Ch. 441; see, also, *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 84 Am. St. Rep. 867, 85 N. W. 698, 53 L. R. A. 603; *Muir v. Jones*, 23 Or. 332, 31 Pac. 646, 19 L. R. A. 441; *Jackson v. Walton*, 28 Vt. 43; *Salter v. Sample*, 71 Ill. 430; *Kassing v. Keohane*, 4 Ill. App. 460; *Bringholff v. Munzanmaier*, 20 Iowa, 513; *Ridgeway Stove Co. v. Way*, 141 Mass. 557, 6 N. E. 714; *Fryatt v. Sullivan Co.*, 5 Hill, 116.) An innocent purchaser without notice or knowledge takes property. (*St. Louis & S. F. Ry. Co. v. Beadle*, 6 Kan. App. 922, 50 Pac. 988; *Landigan v. Mayer*, 32 Or. 245, 67 Am. St. Rep. 521, 51 Pac. 649; *Tibbetts v. Horne*, 65 N. H. 242, 23 Am. St. Rep. 31, 23 Atl. 145, 15 L. R. A. 50; *Bronson on Fixtures*, 155-164; also 374 and note; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In September, 1901, Tony Gerarci was the owner of a certain two-room frame dwelling-house, which he had purchased from H. L. Frank. The house was sold to Gerarci separate from the ground upon which it stood, and he immediately started to remove it to another location. One H. H. Smith thereupon wrongfully, without Gerarci's knowledge or consent, took possession of the house and moved it about, and finally located it at 132 West Platinum street, in Butte, partly upon ground purchased by him from Hayes Cannon, and partly upon land belonging to Cannon. In July, 1902, Gerarci commenced an action in claim and delivery against Smith and others to recover possession of the house. This action was not finally determined until 1904, when Gerarci recovered judgment for the possession of the house or its value. In the meantime, in 1903, Smith and Cannon sold to John Eisenhauer the land upon which the house then

stood, and Smith assumed to sell the house also. Immediately after recovering his judgment, Gerarci had execution issued and placed in the hands of the sheriff. When the sheriff undertook to levy the writ, Eisenhauer instituted this suit to secure an injunction restraining the sheriff from removing the house. Gerarci filed a complaint in intervention. The sheriff answered. Issues were joined, the case tried to the court without a jury, and a decree rendered and entered in favor of the plaintiff. From that decree and an order denying a new trial, the defendant and intervener appeal.

In deciding the case the court said: "When Smith attached Gerarci's house to his (Smith's) realty it became a part of the freehold and passed to Eisenhauer on sale and conveyance to him by Smith, Eisenhauer being a *bona fide* purchaser without notice." In passing upon the motion for a new trial, however, the court held that when Smith seized the house, Gerarci should have asserted his right and should have prevented Smith from attaching the house to Smith's realty, and, after Smith had so attached it, Gerarci should have taken possession of it in his claim and delivery action, or should have filed a notice of *lis pendens*, and having failed to do any of these things, after Smith had sold the property to Eisenhauer, Gerarci was estopped to assert his claim of ownership as against Eisenhauer.

These questions only need to be determined: (1) Where Smith tortiously attaches Gerarci's house, which was then a chattel, to land belonging to Smith and Cannon, by placing it upon a stone foundation, does the house thereby become a part of the real estate as between Gerarci and Eisenhauer, so that by deed of land with its appurtenances and improvements Smith and Cannon could convey to Eisenhauer a title to the house sufficient to defeat Gerarci's claim to the house itself? (2) Is the defense that he was a *bona fide* purchaser for value, without notice, available to Eisenhauer as against Gerarci, the holder of the legal title to the house in question? (3) Is the defense of an estoppel available to Eisenhauer? And (4) does the com-

plaint state facts sufficient to entitle the plaintiff to an injunction?

1. Upon the first proposition many decisions are cited by counsel for the respective parties, all bearing somewhat upon the general proposition, but, with a single exception, presenting facts so different from those in the case now under consideration, that they do not render any aid in reaching a solution of the question before us. The exception noted is the case of *Shoemaker, Miller & Co. v. Simpson*, 16 Kan. 43, which is somewhat analogous to the case before us. Shoemaker, Miller & Co. owned certain bars of railroad iron, or rails, near Wyandotte, Kansas. Simpson owned certain city lots in Lawrence. The Kansas Pacific Railway Company wrongfully took Shoemaker, Miller & Co.'s rails, hauled them to Lawrence, and with them and cross-ties laid a track over Simpson's lots for the purpose of hauling sand. The rails were taken without the knowledge or consent of Shoemaker, Miller & Co., and placed on Simpson's lots without his consent. Shoemaker, Miller & Co. brought an action in replevin against Simpson to recover the rails. Simpson defended upon the theory that when the rails were fixed to the cross-ties imbedded in his land, they thereby became a part of his real estate. The trial court found for the defendant, but on appeal the judgment was reversed, the supreme court saying, among other things: "We know of no way by which an innocent person can be permanently and legally deprived of his property against his will by the wrongs and trespasses of others, so long as it remains within the power of such innocent person to reclaim his property without committing any serious or substantial injury to the person or property of any other person." And again: "But we do not think that any innocent person can be deprived of the title of his personal property against his consent by having it attached without his consent to the real estate of another by a third person, where such personal property can be removed without any great inconvenience, and without any substantial injury to the real estate."

The question, when does a chattel become a part of realty so that it passes as a part of such realty, is one most difficult of solution. It depends upon such a variety of considerations that every case must necessarily depend upon its own state of facts. There is no universal test whereby the character of what is claimed to be a fixture can be determined in the abstract. But one of the elementary rules of the law of fixtures is that a chattel, to become an irremovable fixture, must have been annexed to the realty by the owner of the fixture, or with his consent. (Bronson on Fixtures, 73; 13 Am. & Eng. Ency. of Law, 2d ed., 604; *Adams v. Lee*, 31 Mich. 440; *Cochran v. Flint*, 57 N. H. 514; *Lansing Iron & Engine Works v. Wilbur*, 111 Mich. 413, 69 N. W. 669; *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460, 42 Atl. 101.)

With the exception of property taken by judicial process, no one can be deprived of property to which he has the legal title, without his consent, unless he has estopped himself to assert his title. And where A attaches B's chattels to A's realty wrongfully, and without the knowledge or consent of B, B may maintain replevin, or claim and delivery, to recover the same, if the chattels can be identified. (Bronson on Fixtures, 351; 13 Am. & Eng. Ency. of Law, 2d ed., 681; *McDaniel v. Lipp*, 41 Neb. 713, 60 N. W. 81.) There is no question but what the property in this instance was sufficiently identified by Gerarci, even though certain changes had been made in it after it left his possession.

Under the facts disclosed by this record then, we hold that Gerarci did not lose title to his property by reason of the tortious acts of Smith; and this is true whether Eisenhauer had knowledge of Gerarci's claim at the time he purchased the property or not.

2. But particular stress is laid by respondent upon the proposition that he was an innocent purchaser for value, without notice of Gerarci's claim. This contention, however, cannot prevail. Gerarci had the legal title to the house. Smith had not any title at all. It is a general rule in this country that, in the absence

of statute, the defense of purchase for value and without notice is not available against the holder of the legal title. (*Gaines v. New Orleans*, 6 Wall. (U. S.) 642, 18 L. Ed. 950; *Stout v. Hyatt*, 13 Kan. 232; 23 Am. & Eng. Ency. of Law, 2d ed., 482, and cases cited; 24 Am. & Eng. Ency. of Law, 2d ed., 1169; 19 Cyc. 1052.) But such a defense may be interposed as against the holder of an equitable title only. (19 Cyc. above.)

3. In denying the motion for a new trial the district court held that Gerarci had estopped himself to urge his title to the property, and in making the order said: "But for estoppel, I am of the opinion Gerarci would be entitled to recover even from Eisenhower, a *bona fide* purchaser." This position, however, is altogether untenable. Gerarci in his complaint in intervention set forth his claim to the property, and recited at length the history of his litigation with Smith concerning it. Eisenhower answered this complaint, but, though he had ample opportunity to do so, he did not plead an estoppel.

In *Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994, this court announced the rule as follows: "It is the general rule that matter of estoppel, to be effective, must be alleged. Where however, there has been no opportunity to allege it, it may be given in evidence with the same conclusive effect as if alleged. In *Isaacs v. Clark*, 12 Vt. 692, 36 Am. Dec. 372, it is said: 'It is no doubt true that where the party has an opportunity to plead the estoppel he is bound to do it, and if he omits it, the jury will not be bound by the estoppel, but may find according to the facts. If, however, there has been no opportunity to plead the matter as an estoppel, it may, in general, be given in evidence, and it will have the same conclusive effect as in cases where it is pleaded. This is according to the current of the authorities, though they may not have been entirely uniform.' " However effective an estoppel might have been, if pleaded and proved, it is not available to Eisenhower in this instance, since he did not plead it.

4. Appellants contend that the complaint does not state facts sufficient to constitute a cause of action for an injunction. While

the complaint alleges that plaintiff has no plain, speedy or adequate remedy at law, there are not any facts stated from which such a conclusion could be drawn. If in removing the house the sheriff acted wrongfully and to plaintiff's injury, he would be liable. There is not any allegation that the sheriff is insolvent, nor that his official bond is not ample. Neither is there any allegation from which it can be said that the injury to plaintiff, by a removal of the house, could not be amply repaired by damages. It is elementary that before one can go into a court of equity he must show that he has not a plain, speedy or adequate remedy at law. We think the complaint fails, in this regard, to state a cause of action for an injunction.

In *Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46, this court said: "If plaintiffs had a plain, adequate and complete remedy at law, a court of equity should refuse to take jurisdiction; and, indeed, it would be without jurisdiction, for equity may act in those matters only in which no remedy is afforded in the ordinary course of law, or in which the remedy at law is deficient." (See, also, *McCormick v. Riddle*, 10 Mont. 467, 26 Pac. 202.)

The judgment and order are reversed, and the cause remanded, with directions to grant a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STATE, RESPONDENT, v. MITTEN, APPELLANT.

(No. 2,477.)

(Submitted December 10, 1907. Decided December 28, 1907.)

[92 Pac. 969.]

Criminal Law—Forgery—Information—Duplicity—Evidence—Admissibility—Instructions—Inapplicability—Abstract Statements of Law.**Criminal Law—Forgery—Information—Duplicity—Surplusage.**

1. An information which, after charging forgery of a promissory note, added that defendant, knowing that the instrument was false, uttered, passed and published the same as true and genuine with intent to defraud, etc., did not allege the commission of two offenses, to-wit, the false making of the note and the passing of it, since the latter portion, standing alone, did not state an offense. It was surplusage and should have been omitted.

Same—Forgery—Passing of Instrument—Evidence—Information.

2. Evidence that the defendant, charged with forgery, passed the false instrument, is admissible upon the question of his criminal intent, without an allegation in the information to that effect.

Same—Forgery—Evidence—Admissibility.

3. In a trial for forgery it was error to permit a witness, who testified to a transaction similar to that had by defendant with the persons whose names appeared on the note alleged to have been forged, to give the contents of a letter exhibited by accused to the witness, purporting to be a letter of recommendation from a state official. It was immaterial and should have been excluded.

Same—Forgery—Falsely Making—Altering—Information—Instructions—Applicability to Issues.

4. Where defendant was charged with having forged a promissory note, not by altering it, but by falsely making the same, an instruction telling the jury, *inter alia*, that to constitute the crime of forgery it was sufficient if a genuine instrument "be altered so that it is not the instrument signed by the maker," etc., was erroneous, since in order to charge the offense by alteration, the information must clearly set forth the particulars in which the paper was altered.

Same—Forgery by Alteration—Materiality.

5. To constitute forgery by altering an instrument, it is essential that such alteration be a material one.

Same—Forgery—Evidence.

6. One charged with forgery in fraudulently making an instrument cannot be proved guilty by showing that he altered the same.

Instructions—Abstract Statements of Law.

7. Instructions, though correct as abstract propositions of law, should not be given to the jury if they do not relate to the issues made by the pleadings.

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Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

J. A. MITTEN was convicted of forgery, and from a judgment of conviction and an order denying him a new trial, he appeals Reversed and remanded.

Mr. J. L. Staats, for Appellant.

The information charges two offenses under the statute: the offense of making, forging and counterfeiting the papers set out therein and the offense of uttering and publishing the same. The act of forging and counterfeiting a writing with the intent to defraud is joined with that of uttering and publishing the same as true and genuine in one count. This is bad for duplicity in pleading. (*People v. Tower*, 135 N. Y. 457, 32 N. E. 145; *Territory v. Poulter*, 8 Mont. 146, 19 Pac. 594; *People v. Parker*, 67 Mich. 222, 11 Am. St. Rep. 578, 34 N. W. 720; *State v. Wood*, 13 Minn. 121; 9 Am. & Eng. Ency. of Pl. & Pr. 603, and cases cited; *State v. Stevens*, 56 Kan. 720, 44 Pac. 992; *State v. Goodwin*, 33 Kan. 538, 6 Pac. 899.) The instrument was payable to the Superior School Supply Company or order. In order to negotiate the instrument or to utter and pass the same, it should appear to have been indorsed by the payee. The information does not show any indorsement whatever of the instrument. Information should show how the instrument was uttered and passed. (*People v. Cole*, 130 Cal. 13, 62 Pac. 274; *People v. Bendit*, 111 Cal. 277, 52 Am. St. Rep. 186, 43 Pac. 901, 31 L. R. A. 831; *People v. Palmer*, 53 Cal. 615; see, also, *People v. McKenna*, 81 Cal. 158, 22 Pac. 488; *People v. Mahoney*, 145 Cal. 104, 78 Pac. 354; *State v. McNaspy*, 58 Kan. 691, 50 Pac. 895, 38 L. R. A. 756.)

The testimony of Redfield relative to the purported letter of recommendation was inadmissible. The evident purpose of it was to have the jury infer that the appellant had been guilty of other offenses which were not otherwise shown, and which would tend to degrade and prejudice him. (*People v. Hill*

(Cal.), 34 Pac. 854; *Roper v. Territory*, 7 N. Mex. 255, 33 Pac. 1014; *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45; *People v. Rogers*, 71 Cal. 565, 12 Pac. 679; *People v. Tucker*, 104 Cal. 440, 38 Pac. 195; *People v. Baird*, 104 Cal. 462, 38 Pac. 310; *People v. Arlington*, 123 Cal. 356, 55 Pac. 1003; *State v. Raynolds*, 5 Kan. App. 515, 47 Pac. 573; *State v. Thompson*, 14 Wash. 285, 44 Pac. 533.)

The information to charge forgery by alteration should allege in what respect the instrument was altered. (*Kahn v. State*, 58 Ind. 168; *State v. Bryant*, 17 N. H. 323; *State v. Riebe*, 27 Minn. 315, 7 N. W. 262.)

Tearing off of memorandum on note showing signers as sureties is an immaterial alteration. (*Humphreys v. Crane*, 5 Cal. 173.) Adding rate of interest where rate is left blank is immaterial. (*First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551.) Changing in marginal figures of note or bill is immaterial. (*Horton v. Horton*, 71 Iowa, 448, 32 N. W. 452; *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177.) Cutting off receipt on margin of bond is not a mutilation of bond. (*Bryan v. Dyer*, 28 Ill. 188.) Removal of memorandum written on bill or note and not any part of the writing is immaterial. (2 Am. & Eng. Ency. of Law, 277, and cases cited.) Placing a mere reference memoranda on note is immaterial. (*Maness v. Henry*, 96 Ala. 454, 11 South. 410; *White v. Johns*, 24 Minn. 387.)

One of the theories of the prosecution of the case is, that appellant filled up the blank note in question, after it had been signed. Assuming, for the sake of argument, that he did so, yet a delivery of a writing containing blanks evidently intended to be filled creates an implied authority on the receiver to complete the instrument, especially in negotiable paper in conformity to the character of the writing. (2 Am. & Eng. Ency. of Law, 253, 254, and cases cited; *Gillaspie v. Kelley*, 41 Ind. 158, 13 Am. Rep. 318; *Rainbolt v. Eddy*, 34 Iowa, 440, 11 Am. Rep. 152; *Smith v. Crooker*, 5 Mass. 538; *Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535; *Angle v. Northwestern Mut. Life*

Ins. Co., 92 U. S. 330, 23 L. Ed. 556; *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *State v. Young*, 23 Minn. 551.)

Conviction of forgery can be had only on proof that the person who signed another's name did so without authority. (*People v. Lundin*, 117 Cal. 124, 48 Pac. 1024.)

Mr. Albert J. Galen, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for Respondent.

The allegations in the information relative to uttering, passing, etc., only amplify and accentuate the allegation relative to the intent to defraud. Similar informations have been sustained. (*State v. Patch*, 21 Mont. 534, 55 Pac. 108; *People v. Frank*, 28 Cal. 507; *People v. Leyshon*, 108 Cal. 440, 41 Pac. 480; *People v. Ellenwood*, 119 Cal. 166, 51 Pac. 553; see, also, *Territory v. Ashby*, 2 Mont. 89; 22 Cyc. 380, 381; *State v. Klugherz*, 91 Minn. 406, 98 N. W. 99; *People v. Dole*, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581.)

Instruction No. 11, as given, is a correct statement of the law. The severance of the negotiable part of a contract from that part which renders it non-negotiable, under the circumstances stated in this instruction, is forgery. (19 Cyc. 1375.)

The central thought in instruction No. 12 is that, where an instrument is altered in a material part, and in such a manner as to give the instrument a new meaning, if done falsely, fraudulently and feloniously, it constitutes forgery. This doctrine is sustained by high authority. (19 Cyc. 1375; *State v. Floyd*, 5 Strob. (S. C.) 58, 53 Am. Dec. 689.)

Instruction No. 14 we believe to be a correct statement of the law, and in support thereof cite *State v. Evans*, 15 Mont. 539, 48 Am. St. Rep. 701, 39 Pac. 850, 28 L. R. A. 127, and cases heretofore referred to.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

J. A. Mitten was convicted of the crime of forgery, and appeals from the judgment and an order denying him a new trial.

The charging part of the information is as follows:

"J. A. Mitten on or about the 25th day of August, A. D. 1906, at the county of Gallatin, state of Montana, did, then and there, falsely, unlawfully and feloniously make, forge and counterfeit a writing on paper purporting to be a promissory note and writing obligatory for money, of the tenor following:

" 'Bozeman, Aug. 20th, 1906.

" 'On or before October 1st, 1906, we jointly and severally promise to pay to the Superior School Supply Co., or order, sixty-one dollars, for value received, with interest at six per cent per annum from date until paid, and with attorney's fees in addition to other costs in case the holder is obliged to enforce payment at law.

" 'Payable at ———.

" ' (Signed) J. H. FRENCH.

" ' (Signed) J. A. ORR.

" ' (Signed) M. R. JOHNSON.

" 'P. O. Address, Bozeman.

" '\$61.00 When due Oct. 1, 06. Number ———.'

—"with intent then and there to injure, defraud, cheat and to damage the said J. H. French, J. A. Orr, M. R. Johnson and others, and the said J. A. Mitten then and there having in his hands and possession the said forged and counterfeit promissory note and writing obligatory, did then and there well knowing the said promissory note and writing obligatory to be false, forged and counterfeit, utter, pass and publish the same as true and genuine with intent to defraud, cheat and to damage the said J. H. French, J. A. Orr, M. R. Johnson."

The defendant interposed a general and special demurrer, which was overruled. His counsel insists that the information states two offenses: (a) The false making of the note; and (b) the passing of the alleged forged note. While we think that all that portion of the information above after the word "others" had better been omitted, since it adds nothing whatever to the complete offense charged, still such latter part, standing alone,

does not state an offense, and therefore the information is not open to the objection urged. With this latter portion added, however, the information comes dangerously near invading the provision of section 1834 of the Penal Code, but we are not prepared to say that it is fatally defective. (22 Cyc. 380, 381, and cases cited.) The evidence relating to the passing of the instrument would have been admissible upon the question of the defendant's criminal intent, without the allegations above criticised.

A witness, Redfield, testified to a transaction with the defendant similar to that had by the defendant with French, Orr and Johnson, and; as a part of his testimony, he was asked to give the contents of a letter which the witness said the defendant exhibited to him, purporting to be a letter of recommendation from W. E. Harmon, State Superintendent of Public Instruction. This was objected to, but the objection was overruled. If the defendant had been charged with obtaining money under false pretenses from the witness Redfield, then this evidence might have been very material; but under the information in this case, we think the objection should have been sustained, and the evidence excluded. We cannot conceive of any theory upon which it was admissible. This, evidently, became the opinion of the trial court before the cause was ended, for, by instruction No. 15, this evidence was, in effect, excluded from the jury's consideration, though not done so in express terms. That instruction correctly states the law as follows: "While there can be no forgery without a fraudulent intent, it does not follow that every intent to defraud, although coupled with a written instrument, is forgery. For example, procuring the execution of a document by a misrepresentation as to its contents, or by misstatement of facts, is not forgery." This instruction is entirely inconsistent with the idea that the so-called Harmon letter was material.

But the principal objections urged by appellant are to instructions 11, 12, 13 and 14, given by the court. These instructions are all upon the same subject. Assuming, as the attorney gen-

eral contends, that the objections to No. 11, made at the time the instructions were settled, were not sufficiently specific, still the point is saved by the objections to 12, 13 and 14. A reproduction of No. 13 will be sufficient to illustrate the appellant's contention:

"No. 13. You are instructed that in order to constitute the crime of forgery it is not necessary that the signature or the signatures to any instrument in writing be false, neither is it necessary or essential that any person be actually injured or defrauded. It is sufficient, if a genuine instrument be altered so that it is not the instrument signed by the maker or makers, and if such alteration be a material one, and changed in any material way the legal effect of the instrument or the liability of the parties thereto; and if such alteration be falsely, fraudulently or feloniously done, it is forgery, notwithstanding the fact that the signature or signatures may be genuine."

The defendant was charged with having forged the promissory note set out in the information above, by falsely making the same. He was not charged with having forged the note, or another instrument, by altering either. In order to charge forgery by altering an instrument, the information must clearly set forth the particulars in which the instrument was altered. (19 Cyc. 1394; *State v. Knippa*, 29 Tex. 295; *State v. Fisher*, 58 Mo. 256; *State v. Riebe*, 27 Minn. 315, 7 N. W. 262; *Kahn v. State*, 58 Ind. 168.) The reason for this rule is manifest. It is not every alteration of one of the instruments mentioned in section 840 of the Penal Code which amounts to forgery. "In order that an alteration may constitute forgery, it is essential that it be material." (19 Cyc. 1375, and cases cited; *Bittings v. State*, 56 Ind. 101; *State v. Bryant*, 17 N. H. 323.) It is therefore necessary that the information shall set forth the particulars in which the instrument is alleged to have been altered, in order that the trial court may say, as a matter of law, whether the alteration is of such a character as to constitute the crime of forgery.

Since the information is entirely insufficient to charge forgery by alteration, instructions 11, 12, 13 and 14 are upon an issue not presented by the information and the defendant's plea of not guilty. A person cannot be charged with forgery in fraudulently making an instrument, and proved guilty by showing that he altered the instrument.

Judge Armstrong, to whom the note was negotiated by the defendant, was satisfied that the signatures of French and Johnson were genuine. He did not know anything about Orr's signature. There is some dispute in the testimony as to whether any of these parties repudiated the note or questioned its genuineness until some time in December. French, Orr and Johnson each testified that he did not sign the note, but did sign an order for certain school supplies. With respect to the signatures to the note they said: French: "The signature to the note is very much like my signature." Orr: "The signature on plaintiff's Exhibit No. 1 [the note in question] is very similar to mine." Johnson: "The signature attached to plaintiff's Exhibit No. 1 [the note in question], or on there, favors mine." The defendant testified positively that the signatures to the note are the genuine signatures of French, Orr and Johnson, and that he saw each sign his name to the note after the same had been filled out as it appears in the information. In view of this state of the case, it would appear to be a reasonable supposition that the jury found the defendant guilty of detaching the note in question from another portion of the page of his order-book, a case which instructions 11, 12, 13 and 14 presented for their consideration, but an entirely different case from the one presented by the information and the defendant's plea.

It is elementary that instructions ought not to be given which do not relate to the issues made, even though they are correct as abstract statements of rules of law.

For the reasons assigned, the judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

FLEMING, EXECUTRIX, APPELLANT, v. LOCKWOOD, RESPONDENT.

(No. 2,470.)

(Submitted December 9, 1907. Decided December 23, 1907.)

[92 Pac. 962.]

Waters—Ditches—Seepage—Liability for Injury—Negligence—*Sic utere tuo ut alienum non laedas*—Trespass on the Case—Burden of Proof—Instructions—Harmless Error.

Waters—Ditches—Owner not an Insurer.

1. A ditch owner is not an insurer of his ditch against damages which may result from its operation.

Same—Ditches—Injury—Liability of Owner—Instructions.

2. Plaintiff in an action to recover damages alleged to have been caused to his lands by seepage from defendant's ditch, asked the court to instruct the jury that if the injury was caused as alleged, the verdict should be for plaintiff, irrespective of the question of negligence on the part of defendant in the construction and operation of the ditch. This was refused and one given in lieu thereof, announcing the rule that defendant was only bound to exercise ordinary care in the construction and maintenance of his ditch, and that, if he did so, he could not be held responsible. *Held*, that the court's action was correct.

Same—*Sic utere tuo ut alienum non laedas*—Applicability of Maxim.

3. The doctrine of the maxim *Sic utere tuo ut alienum non laedas*, is not inconsistent with the rule of law that a man may use his own property as he pleases, for all purposes for which it is adaptable, without being answerable for the consequences, if he is not an active agent in designedly causing injury, if he does not create a nuisance, or if he exercises due care and caution to prevent injury.

Actions—Common-law Principles—Applicable Under Codes.

4. While by the adoption of the Codes the common-law forms of pleading were abolished in this state, the fundamental principles of that law underlying the various actions, must still be looked to in determining questions relating to such actions.

Actions—Trespass—Trespass on the Case.

5. The action of trespass presumes the doing of an act wantonly or in total disregard of another's rights; whereas, the action of trespass on the case assumes that the injury complained of is the result of negligence or nonfeasance.

Waters—Ditches—Injury—Seepage—Actions—Trespass on the Case—Burden of Proof.

6. Where, in an action to recover damages for injury alleged to have been caused to plaintiff's lands by seepage from defendant's ditch, it was not contended that the seepage was intentionally caused by defendant, nor claimed by the latter that it was the result of inevitable accident or an act of God, the injury, if it occurred at all, must have been the result of negligence on defendant's part

in constructing or operating the ditch, and the action was maintainable only as an action of trespass on the case, in which the burden of proving defendant's negligence, in the first instance, was upon plaintiff.

Same—Negligence—Degree of Proof—Instructions—Harmless Error.

7. While it was error to instruct the jury in the case above mentioned, that, before plaintiff could recover, he must have established by a *clear* preponderance of the evidence that the ditch in question was negligently and defectively constructed or maintained, etc.—thus, by the use of the word “clear,” imposing a greater burden upon plaintiff than the law requires—the error was harmless, where plaintiff did not rely upon defendant's negligence nor offer any evidence on that question, but took the erroneous position that defendant was an insurer of his ditch and responsible in any event, and where the court would have been justified in directing a verdict for defendant, in that plaintiff had failed to make out a case.

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

ACTION by Johanna Fleming, executrix of John Fleming, deceased, against W. S. Lockwood. Judgment for defendant. Plaintiff appeals from an order denying her a new trial. Affirmed.

Mr. W. H. Trippett, and Messrs. Rodgers & Rodgers, for Appellant.

Messrs. Scharnikow & Paul, and Messrs. Walsh & Nolan, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced in the district court of Powell county by Johanna Fleming, guardian of John Fleming, an incompetent person, to recover damages from W. S. Lockwood, and to secure an injunction restraining the defendant from maintaining and operating a certain irrigating ditch.

In substance, the complaint charges that the ditch was constructed over Fleming's land, wrongfully and without his consent; that it was so carelessly and negligently constructed and managed by Lockwood that the water running therein seeped through the bottom and north side of the ditch to and upon

meadow land belonging to Fleming, and lying north of the line of the ditch; and that such seepage water arose and came out on the said meadow land and overflowed it, made it wet and marshy, and destroyed the hay growing on said land, and rendered the land worthless, to plaintiff's damage in the sum of \$12,500. The second cause of action recites the same facts, and further alleges that the defendant threatens to continue to use and maintain the ditch as set forth, to the irreparable injury of the plaintiff and John Fleming.

The answer denies any wrongful entry upon the land of Fleming, and alleges that the ditch was constructed through Fleming's land with his consent, and otherwise practically amounts to a general denial of the allegation of the complaint. Before the case was finally disposed of in the district court, Fleming died, and Johanna Fleming, as executrix of his last will, was substituted as plaintiff.

Upon the trial, plaintiff offered testimony tending to show the extent of the damage to the meadow land, and that the same was caused by water seeping from the defendant's ditch, and rested. The evidence offered by the defendant tended to show that the injury to plaintiff's land resulted from water escaping from a certain slough on plaintiff's land, with which defendant had nothing whatever to do. Defendant also offered some testimony tending to show that his ditch was constructed and maintained in a good, workmanlike manner, and that there was in fact no seepage from it. The plaintiff asked the court to instruct the jury to the effect that, if plaintiff's lands were injured by seepage waters escaping from defendant's ditch, then the verdict should be for the plaintiff, without regard to the question of negligence on the part of the defendant in the construction or operation of the ditch. This request was refused, and, in lieu of it, the court instructed the jury that the defendant was bound to exercise ordinary care in the construction and maintenance of the ditch, and, if he exercised such degree of care, "then he would not be responsible for the damage complained of, through the seepage of water from his ditch, if you find from the evidence

there was any such seepage." A general verdict was returned in favor of the defendant, and a judgment entered thereon. From an order denying plaintiff a new trial, this appeal is prosecuted.

The plaintiff's theory of the case is illustrated by the instruction which the court was requested to give, as above set forth. The defendant's theory is illustrated by the instruction given by the court in lieu of that asked by the plaintiff. These different theories of the respective parties present the principal question for solution, and, singularly enough, each of them is relying upon the former decisions of this court to support his contention. The plaintiff relies upon *Fitzpatrick v. Montgomery*, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416, and *Lincoln v. Rodgers*, 1 Mont. 217, and *Nelson v. O'Neal*, 1 Mont. 284, cited in the *Fitzpatrick Case*; while respondent relies upon *Hopkins v. Butte & M. Com. Co.*, 13 Mont. 223, 40 Am. St. Rep. 438, 33 Pac. 817, and upon *King v. Miles City Irr. D. Co.*, 16 Mont. 463, 50 Am. St. Rep. 506, 41 Pac. 431. If appellant's theory is correct, and the question of negligence does not enter into a case of this character, then every ditch owner is an insurer of his ditch against damages therefrom to his neighbor, unless such damage is occasioned by an act of God or inevitable accident; and her counsel confidently rely upon the *Fitzpatrick Case* above to support this contention.

The *Fitzpatrick Case* was decided by this court in 1897, the *Hopkins Case* in 1893, and the *King Case* in 1895. In submitting the *Fitzpatrick Case* to this court, attention was directed particularly to the *Hopkins* and *King Cases*, but though Chief Justice Pemberton wrote the opinion in the *Hopkins Case*, and also in the *Fitzpatrick Case*, no mention is made of either of these two earlier cases in the opinion in the *Fitzpatrick Case*; so that we must assume that the court did not intend to overrule either, or both, of its former decisions, but, on the contrary, differentiated the cases.

In *Fitzpatrick v. Montgomery* it appears that Montgomery, a subsequent appropriator of the waters of Buffalo creek, so con-

ducted his placer mining operations above Fitzpatrick's land that tailings and other debris were carried down that creek and deposited upon Fitzpatrick's land, rendering it unfit for agricultural purposes, and that such deposit of tailings and other debris in the creek, which flowed through Fitzpatrick's land, caused the creek to cut a new and different channel through his land. Fitzpatrick was the prior appropriator of the waters of the same creek. The decision of this court appears to have been rendered upon precedent, rather than upon principle, and nearly every case cited in the opinion relies upon and applies the principle which counsel for plaintiff sought to have the trial court in this case embody in the offered instruction, namely: "That every one must so use his property as not to injure that of his neighbor." This principle of law finds expression in the maxim *Sic utere tuo ut alienum non laedas*, which our Civil Code, in section 4605, has translated as follows: "One must so use his own rights as not to infringe upon the rights of another."

If the courts whose decisions are cited and relied upon in the *Fitzpatrick Case*, entertained the idea that this maxim is not applicable to negligence cases, they were mistaken. While it is true that by adopting a Code we have abolished common-law forms of pleading, this abolition has not in any sense changed the fundamental rules of substantive law, and we must still resolve questions presented in our litigation with reference to those ancient rules of law which had reason, experience, and the necessities of society for their foundation.

At the common law the *Fitzpatrick Case* would have fallen into one of two classes of cases, trespass, or trespass on the case, the first of which might, or might not, involve a question of negligence, depending upon the particular circumstances, while negligence is the very gist of the latter. (Holmes on Common Law, 106.) The maxim above was repeatedly applied in actions of trespass. It was likewise applied repeatedly in actions of trespass on the case. In *Gerke v. California Steam Nav. Co.*, 9 Cal. 251, 70 Am. Dec. 650, the court said: "The general rule

upon this subject is laid down with great clearness by Cowen (Cowen's Treatise, 384). Speaking of the action of trespass on the case, he says: 'It lies in all cases of negligence in the use or disposition of one's property, or in clearing or improving it, by which another is injured; and the true question in such cases is whether the defendant or his servant has been guilty of negligence. For it is a maxim in law that a man is bound so to use his own as not to injure that which belongs to his neighbor.' "

This maxim furnishes, in a general sense, the rule by which every member of society possesses and enjoys his property; but it is not an ironclad rule, without limitations. If applied literally in every case, it would largely defeat the very purpose of its existence; for in many instances it would deprive individuals of the legitimate use of their property, and, for all practical purposes, destroy it. (*Hentz v. Long Island R. R. Co.*, 13 Barb. 646.) The doctrine of the maxim is not inconsistent with the rule of law that a man may use his own property as he pleases, for all purposes for which it is adaptable, without being answerable for the consequences, if he is not an active agent in designedly causing injury, if he does not create a nuisance, or if he exercises due care and caution to prevent such injury. (*Fisher v. Clark*, 41 Barb. 329.)

In *Gibson v. Puchta*, 33 Cal. 310, which was an action to restrain the defendant from running water upon plaintiff's mining claim and for damages caused thereby, the court said: "In irrigating his land the defendant is subject to the maxim *Sic utere tuo ut alienum non laedas*. An action cannot be maintained against him for the reasonable exercise of his right, although an annoyance or injury may thereby be occasioned to the plaintiffs. He is responsible to the plaintiffs only for the injuries caused by his negligence and unskillfulness, or those willfully inflicted in the exercise of his right of irrigating his land. (Broom's Legal Maxims, 274.) There is no pretense that any injury was willfully occasioned by the defendant, and there is no finding of negligence or unskillfulness on the part of the defendant. The plaintiffs, therefore, are not entitled to judg-

ment on the findings." (See, also, *Panton v. Holland*, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369; Broom's Legal Maxims, 275.)

Chief Justice Nelson, in *Harvey v. Dunlop, Hill & Denio* (Lalor), 193, said: "No case or principle can be found, or, if found, can be maintained, subjecting an individual to liability for an act done without fault on his part." (Holmes' Common Law, 94.) Indeed, it has been said that this maxim is not applicable to a mere omission to act, but rather to an affirmative act or course of conduct, in invasion of another's right. (Anderson's Law Dictionary, 1076.)

The case of *Stinson v. New York Central R. R. Co.*, 32 N. Y. 333, 88 Am. Dec. 332, was an action for damages for the death of one Stinson by the wrongful act of the defendant railroad company. In disposing of the case the New York court said: "And the duty the company owed to him (Stinson) in the management of its trains was the exercise of that ordinary care which every man owes to his neighbor, to do him no injury by negligence while both are engaged in lawful pursuits, a duty which begins and ends in the maxim *Sic utere tuo ut alienum non laedas*."

Since negligence is the very essence of an action of trespass on the case, and negligence was held not to enter into the *Fitzpatrick Case*, we must assume that the case was treated as an action of trespass, and of that character of such an action which is maintainable without reference to the question of negligence; in other words, the court must have held that Montgomery's situation was practically the same that it would have been had he hauled the debris in carts and deposited it upon Fitzpatrick's land, in which latter event, of course, the degree of care which he exercised would have been of no moment. This, at least, is the theory of most of the cases cited in the opinion in the *Fitzpatrick Case*; and while it is a matter of doubt whether the *Fitzpatrick Case* was in fact of such character, it was evidently treated as such, for upon no other possible theory can it be sustained.

Familiar illustrations of the difference between an action in trespass, where negligence need not be alleged or proved, and

an action in trespass on the case, which must be maintained, if at all, upon the theory of defendant's negligence, are these: If A strikes B with a log, B may maintain an action in trespass, and the question of negligence does not enter into the case at all. But if A places the log in a road, and B comes along and falls over it and injures himself, he may maintain an action on the case against A, by alleging and proving A's negligence. (*Dodson v. Mock*, 20 N. C. (234), 282, 32 Am. Dec. 677.) So, if A opens a headgate in his ditch and sends water down upon B's land in such quantity as to cause injury, B could maintain an action in trespass; but if A's ditch gives way, precipitating the water upon B's land, B's action would be on the case; and the reason for the rule in each of these classes of cases is apparent. An action of trespass presumes the active agency on the part of the wrongdoer in causing the injury, or, what is the same thing, the doing of the act wantonly or in total disregard of the other's right; while the action on the case assumes that the injury is consequential, or the direct injury is the result of negligence or nonfeasance. In other words, trespass implies wantonness, malice, or willfulness, while trespass on the case implies only negligence.

But, whatever doubt may arise as to the character of the action applicable to the *Fitzpatrick Case*, there is no doubt or uncertainty whatever as to the class into which the case now under consideration falls. Upon the facts stated, it could only be maintained as an action of trespass on the case, since there is not any contention that Lockwood intentionally caused the water to seep from his ditch. If, in fact, the seepage occurred as plaintiff contends, it must have been the result of negligence on Lockwood's part, either in constructing or operating the ditch, since it is not contended that it was the result of inevitable accident or was caused by an act of God; and therefore the plaintiff had the burden of proof, in the first instance, to show negligence on the part of the defendant. (*Greeley Irr. Co. v. House*, 14 Colo. 549, 24 Pac. 329; Long on Irrigation, sec. 68.) A ditch owner is not an insurer of his ditch against

damages which may result from its operation. (*Howell v. Big Horn Basin C. Co.*, 14 Wyo. 14, 81 Pac. 785, 1 L. R. A., n. s., 596.)

Hopkins v. Butte & M. Com. Co., above, was an action for damages caused to the plaintiff's crops. The plaintiff owned land along Deep creek in Cascade county. The defendant used that creek for floating logs down to its mills at Great Falls, and had cut and placed in the stream above plaintiff's lands large quantities of logs, to be floated down to its mills. The logs had formed a jam in the stream so as to obstruct the natural flow of the water, causing a large quantity of water to be collected above, so that, when the jam gave way, the water, so collected, overflowed the banks of the creek, submerging plaintiff's lands, and by depositing debris thereon, caused damages to his crops, fences, etc. This court said: "The gist of this action is negligence; and until some negligence is shown there cannot be said to be any liability." The trial court in that case had instructed the jury just as plaintiff asked the court to do in this instance, but for the error the judgment was reversed, and the cause remanded for a new trial.

King v. Miles City Irr. D. Co. was an action for damages caused to plaintiff's land by a break in defendant's irrigating ditch. The trial court instructed the jury as follows: "In this connection the court further instructs the jury that it is incumbent upon the defendant company to construct its flumes and ditches in such a reasonable and prudent manner as that no damage shall result to the person whose lands are crossed by the ditch." This court on appeal said: "The instruction was clearly erroneous. The court undertook to lay down the measure of reasonable and prudent conduct on the part of the defendant. The court did not instruct that the care by the defendant should be either ordinary or extraordinary, but, on the other hand, instructed the jury that the degree of care should be such that no damage should result. The defendant was thus held, not only to the highest and most extraordinary degree of care, but was held to exercise such care that the plaintiff would not

suffer any damage. In other words, the instruction made the defendant absolutely an insurer against all damages. It removed the question of negligence from the jury altogether, and practically instructed them that, if the damage occurred, the defendant was liable, without regard to its negligence."

"A person may lawfully collect water by means of a dam, or in ditches, canals, culverts, or pipes, and is not liable in such a case for injuries caused by the escape of the water, in the absence of negligence on his own part." (Gould on Waters, sec. 298.)

"The measure of the care which the ditch owner is bound to use is that which ordinarily prudent men exercise under like circumstances when the risk is their own. And if he fails to exercise this degree of care, he is liable for injuries which the water causes to the adjoining property in consequence of his negligence." (Farnham on Waters and Water Rights, sec. 634.)

It is not necessary for us to consider the *quantum* of proof required in any controversy of this character to make out plaintiff's *prima facie* case, since this action was not tried on the theory of negligence, so far as the plaintiff is concerned.

In our opinion, the trial court was clearly right in the theory of the case adopted, and was likewise correct in refusing to give the instruction which the plaintiff requested. In addition to the cases considered above, see, also, *Lisonbee v. Monroe I. Co.*, 18 Utah, 343, 72 Am. St. Rep. 784, 54 Pac. 1009; *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197.

2. Error is predicated upon the giving of instruction No. 5, which is as follows: "In this case, damages are claimed by plaintiff on account of injuries done to his land through the seepage of water from the ditch of the defendant, owing to its negligent and defective construction and maintenance. Before you can find for the plaintiff in this case, the fact must be established by clear preponderance of the evidence that the ditch in question was defectively constructed or negligently maintained, and that through such defective construction or negligent maintaining the seepage occurred from which it is claimed the injury

resulted, and unless the plaintiff has established this fact by a clear preponderance of the evidence, your verdict should be for the defendant." That in using the word "clear" before the word "preponderance" the district court attempted to impose upon the plaintiff a greater burden than the law requires, is established by the former decisions of this court. (*Gehlert v. Quinn*, 35 Mont. 451, 90 Pac. 168, and cases cited.) But while this instruction is clearly erroneous, it is error without prejudice. The plaintiff offered no evidence of negligence, and did not rely upon negligence, but took the position that the defendant was an insurer of his ditch. That theory was incorrect. The plaintiff failed to make out a case, and the district court would have been justified in directing a verdict for the defendant; so that it is entirely immaterial what instructions it gave, since the verdict returned was in defendant's favor.

The order appealed from is affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

IN RE GRAYE.

(No. 2,509.)

(Submitted December 14, 1907. Decided December 28, 1907.)

[93 Pac. 66.]

Criminal Law—Justices of the Peace—Police Courts—Appeal—Record—Jurisdiction—Irregularities—Waiver.

Criminal Law—Police Courts—Change of Venue—Justices' Courts.

1. *Obiter*: A police judge may, under Penal Code, section 2685, grant a change of the place of trial of a criminal cause pending before him, upon a motion, supported by a proper showing, either for bias or prejudice of such judge, or prejudice in the citizens of the township.

Same—Justices of the Peace—Appeal—Record.

2. In the absence of specific statutory provision on the subject, the original files, together with a copy of the docket minutes, held, to constitute the record on appeal, in a criminal cause, from a justice of the peace to the district court.

Same—Justices of the Peace—Appeal—Irregularities—Waiver—Jurisdiction.

3. By specifically waiving all previous irregularities and informalities, when appearing before a justice of the peace in a criminal cause which had been transferred from a police court, and of which both the justice and magistrate had jurisdiction, and submitting to trial without objection, defendant was precluded from thereafter attacking the resulting judgment on the ground that by reason of the failure of the police judge to transmit a copy of his docket to the justice of the peace, the latter did not acquire jurisdiction to try the cause.

Jurisdiction—Waiver.

4. The rule that if a court has jurisdiction of the subject matter of an action, a general appearance of the defendant to the merits, without objection, is a waiver of all personal privilege in respect of the particular court in which the action is brought, applies to courts of limited as well as of general jurisdiction.

Criminal Law—Justices of the Peace—Appeal—Jurisdiction—District Courts.

5. Since the district court on an appeal from a justice's court does not sit as a court of review to correct errors, but is required to try the cause *de novo* upon the merits, the fact that the justice may have lost jurisdiction in trying a criminal case in part on a legal holiday, and in thereafter taking it under advisement instead of entering judgment at the close of the trial, all without objection by defendant, did not deprive the district court of jurisdiction. The justice having had jurisdiction of the subject matter and of the defendant, the appeal clothed the district court with power to proceed, no matter what irregularities may have attended the trial in the lower court.

ORIGINAL APPLICATION by L. Vernon Graye for writ of *habeas corpus*. Writ denied.

Mr. C. A. Spaulding, and *Mr. E. A. Carleton*, for Complainant.

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Habeas corpus. The petition filed herein alleges, substantially, that on May 10, 1907, the complainant was by complaint under oath, filed in the police court of the city of Helena, charged with a violation of section 457 of the Penal Code; that, having been brought before the police judge under arrest and duly arraigned, he entered his plea of not guilty, and was admitted to bail; that the cause was not set down for trial, but that on May 20th the court, of its own motion and

without any showing by affidavit or otherwise, transferred it to the court of S. W. Langhorne, a justice of the peace of Helena township, and forthwith transmitted the original papers in the cause to said justice; that the justice thereupon entered the cause upon his docket, and fixed May 29th, at 2 o'clock P. M., as the date of trial; that on the date fixed the trial was begun, but, not being concluded, was adjourned to May 30th, at 10 o'clock A. M., the same being a legal holiday; that the hearing of the evidence was concluded on that day, and the cause taken under advisement until June 1st, at 10 A. M.; that on the latter date the justice rendered his decision finding the defendant guilty and appointing June 3d at 10 o'clock A. M., as the time for pronouncing judgment; that at the appointed hour, the complainant appeared and was sentenced to pay a fine of \$100, and was committed to the county jail until the same should be satisfied; that judgment was thereupon entered by the justice upon his docket; that an appeal was on the same day taken to the district court; and that thereafter, on November 26, 1907, the complainant was by a jury again found guilty, and by the judgment of the court sentenced to a term of four months in the county jail, where he is now detained. It is alleged that this detention is illegal for the following reasons: (1) That the police judge had no power upon his own motion to transfer the cause to the justice's court, and for this reason the justice was without jurisdiction to try it; (2) that, if the justice did have jurisdiction to try it, he lost jurisdiction during the course of the trial by proceeding with it on May 30th, a legal holiday, and by not entering judgment at the close of the trial; and (3) that by reason of the lack of jurisdiction by the justice's court, the district court had no power to try the cause and impose sentence.

Upon the filing of the petition this court issued the writ to the sheriff, and also a writ of *certiorari* to the clerk of the district court, requiring him to certify up a copy of the docket of the justice who tried the cause. Upon the production of the prisoner the attorney general interposed a motion to quash

the writ, contending that, since upon the face of the proceedings it appeared that the justice had jurisdiction of the offense, and the complainant voluntarily submitted to a trial, thereafter taking an appeal to the district court, he could not question the jurisdiction of the latter to try the cause and enter judgment. Upon the questions thus raised the cause was submitted for decision.

1. It is conceded by counsel for complainant and the attorney general that a police judge is authorized by statute to grant a change of the place of trial in a criminal cause, upon a motion supported by a proper showing, either of bias or prejudice of such judge, or prejudice in the citizens of the township, by reason of which in either case the defendant cannot have a fair and impartial trial. (Pen. Code, sec. 2685.) We are inclined to the opinion that the concession is properly made, though the question does not arise here, for the reason that the jurisdiction of police judges extends to all misdemeanors enumerated in the statute defining the jurisdiction of these officers (Pol. Code, sec. 4911, amended by Sess. Laws 1903, p. 27, Chapter 16), including the offense defined in section 457, *supra*, and is concurrent with that of justices of the peace.

The statute (Pen. Code, sec. 2682) requires the justice or police judge to enter upon his docket all proceedings in the cause, and, upon a change of the place of trial, to transmit with the files a certified copy of his minutes. For some unexplained reason the police judge failed to observe this requirement. There is no provision in the Penal Code indicating what record shall be transmitted to the district court when an appeal is taken. But we must presume that the original files, together with a copy of the docket minutes, constitute the record. This is the requirement in civil cases, the trial being *de novo* upon the papers filed in the justice's court, unless the court for good cause permit others to be filed. (Code Civ. Proc., sec. 1761.) Since in criminal cases the trial is also *de novo* (Pen. Code, sec. 2717), in the absence of specific provision on the subject, we must conclude that the same method of pro-

cedure must be followed in criminal cases. At any rate, in the absence of specific provision on the subject, this course would seem most appropriate, and it would seem to be necessary, for the reason that the plea is oral, and an appeal may be taken by oral notice at the time of the rendition of the verdict or judgment. (Pen. Code, sec. 2713.) A copy of the docket is necessary to show the nature of the plea that judgment has been entered and that the appeal has been properly taken. Furthermore, on appeal in civil cases each party has the benefit of all legal objections taken in the justice's or police court, and since no bill of exceptions is provided for, the docket furnishes the only means by which some, at least, of the objections may be made to appear. These remarks dispose of the incidental question, made by the attorney general, whether the transcript of the docket properly forms part of the record on appeal.

The absence of the copy of the docket of the police judge does not, however, affect the merits of this application. The justice's docket recites that, when the defendant, accompanied by his counsel, appeared before him on May 20th, he set the cause for trial on May 29th, "all informalities and irregularities being waived by counsel for defendant." It is not a material inquiry, therefore, whether the change of the place of trial was ordered by the police judge of his own motion, or whether it was made upon the application of the defendant. Since it is conceded that he had jurisdiction of the offense under the statute, that a complaint was filed giving him jurisdiction of the particular cause, and that the defendant had been properly arrested and brought before him, he could upon proper application order a change of the place of trial. The justice had jurisdiction of the offense. The irregularity of the procedure by which the cause was brought into his court was expressly waived by the defendant. He submitted to a trial upon a complaint charging him with the particular offense. He cannot now be heard to say that the justice did not have jurisdiction of the cause or of his person. He was entitled to make his ob-

jection at the time. Having failed to do so, or, rather, having expressly waived the irregularities, the court had jurisdiction to proceed.

In *Woldenberg v. Haines*, 35 Or. 246, 57 Pac. 627, there was an application to the justice by the defendant for a change of venue after answer. The affidavit for the change was not sufficient. The parties, however, thereafter appeared before the justice to whose court the change had been made, and stipulated for a continuance. The defendant had judgment on his counterclaim. Thereupon, upon application of the plaintiff, the judgment was annulled by the circuit court, on the ground that the justice trying the case had not jurisdiction. On appeal the supreme court held that the appearance of the parties and their submission of the case waived the irregularity, and the jurisdiction was complete. The court said: "Justices' courts having jurisdiction of actions for the recovery of money, when the amount involved does not exceed \$250 (Hill's Ann. Laws, 1892, sec. 908), the transcript sent to the justice's court of Harney district gave it jurisdiction of the subject matter, and the general appearance of the plaintiff, and his participation in the trial of the action, gave it jurisdiction of his person, and authorized it to hear and determine the issues." The same conclusion was reached in *Magner v. Renk*, 65 Wis. 364, 27 N. W. 26, wherein the affidavit for a change of venue was wholly insufficient; but after the change was directed, the parties proceeded with the trial without objection.

Smith v. Circuit Judge, 46 Mich. 338, 9 N. W. 440, was a case in which the justice before whom it was brought directed a change of venue because, being ill, he was not able to proceed with the trial. The parties appeared before the justice to whose court it was transferred and proceeded with the trial without objection. On application for *mandamus* to set aside the proceedings had under the judgment, on the ground that it was void because the justice had no power to order the change, it was held that the parties had waived the irregularity of the transfer, and that the judgment was valid.

In *Moore v. Wabash Ry. Co.*, 51 Mo. App. 504, the court granted a change of venue over the objection of one of the parties. Nevertheless the party objecting appeared in the court to which the case was sent, and went to trial without objection. It was held that the objection to the jurisdiction after verdict came too late.

All of these cases proceeded upon the theory that, since jurisdiction of the subject matter was conferred by law, errors and irregularities in acquiring jurisdiction of the particular case, and of the person, could be waived by the parties, and the validity of the resulting judgment could not be assailed by reason of them. With this view we agree. It in nowise conflicts with the conclusion, several times announced by this court, that jurisdiction of justices' and police courts must appear affirmatively, and is not aided by the presumption attaching to the judgments of courts of general jurisdiction. (*State v. Laurandau*, 21 Mont. 216, 53 Pac. 536; *Duane v. Molinak*, 31 Mont. 343, 78 Pac. 588; *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695.)

Here jurisdiction of the offense is not controverted. That a complaint was filed as the statute requires (Pen. Code, sec. 2680) charging an offense is admitted. The defendant was arrested and brought before the court and entered his plea. After the cause was transferred to the justice's court and was filed there, he made no objection, but waived all previous irregularities and submitted to a trial. He must be held to be bound by this action. And it is immaterial to inquire whether the transfer was regular. There is some conflict in the decisions on this point, but with perhaps some exceptions, which it is not necessary to notice here, the better rule is that, if a court has jurisdiction of the subject matter of the action, a general appearance of the defendant to the merits, without objection, is a waiver of all personal privilege in respect of the particular court in which the action is brought. (*St. Louis & San Francisco R. R. Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659.) This rule applies to courts of limited, as well as to courts of general,

jurisdiction. (2 Ency. of Pl. & Pr. 613.) The following cases, all of which are cited in *Woldenberg v. Haines*, *supra*, either directly or by analogy, support this view: *Aurora F. Ins. Co. v. Johnson*, 46 Ind. 315; *Christ v. Flannagan*, 23 Colo. 140, 46 Pac. 683; *Ex parte Whitmore*, 9 Utah, 441, 35 Pac. 524; *Cherry v. Lilly*, 113 N. C. 26, 18 S. E. 76; *Seley v. Parker* (Tex. Civ. App.), 45 S. W. 1026; *Solomon v. Norton*, 2 Ariz. 100, 11 Pac. 108; *Yater v. State*, 58 Ind. 299; *Hazard v. Wason*, 152 Mass. 268, 25 N. E. 465; *Breathwit v. Bank of Fordyce*, 60 Ark. 26, 28 S. W. 511. (See, also, *Galveston etc. Ry. Co. v. Baumgarten*, 31 Tex. Civ. App. 253, 72 S. W. 78; *Railway Co. v. Ramsey*, 22 Wall. (U. S.) 326, 22 L. Ed. 823.)

2. The last two contentions may be met by answer to the single question, What was the effect of the appeal to the district court? The statute, as already pointed out (Pen. Code, sec. 2717), requires the district court, upon appeal, to try the cause *de novo*, that is, just as if the cause had originated in that court, its jurisdiction being dependent, of course, upon the jurisdiction of the justice's court of the subject matter and of the parties. It does not sit as a court of review for the correction of errors, but to give the defendant a new trial upon the merits. While it may dismiss a cause on the ground that it has no jurisdiction of the subject matter—just as the justice should have done—if the action was properly instituted in the first place, the appeal clothes that court with the power to proceed, no matter what irregularities may have attended the trial in the justice's court. (*State v. O'Brien*, 35 Mont. 482, 90 Pac. 514.) It is, therefore, immaterial whether the justice lost jurisdiction of the defendant by conducting the trial in part on a legal holiday, or by taking the cause under advisement from May 30th until June 1st, or by not observing the directions of the statute in pronouncing sentence. A party may not, under the guise of an application for a trial *de novo*, insist that irregularities, to which he made no objection, shall be taken note of, or that the judgment, which is abrogated by the appeal, be reversed on account of them.

The case of *State ex rel. Collier v. Huston*, 36 Mont. 178, 92 Pac. 476, recently decided, is not in point. In that case the justice took the case on trial before him under advisement for an indefinite time. It was held that this was violative of an express direction of the statute requiring him to render judgment at the close of the trial. Moreover, the cause was not removed to the district court by appeal. If such had been the case, doubtless the conclusion would have been reached that the appeal was a waiver of the irregularity, and that the district court should have proceeded with the trial on the merits. What the result would have been in this case, had an appeal not been taken, it is useless to inquire.

The motion of the attorney general to quash the writ and dismiss the proceeding is sustained, and the complainant is remanded to the custody of the sheriff for execution of the sentence.

Dismissed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

Rehearing denied January 24, 1908.

DEMERS, RESPONDENT, v. GRAHAM, SHERIFF, ET AL., DEFENDANTS. PRIDEAUX, APPELLANT.

(No. 2,476.)

(Submitted December 10, 1907. Decided December 28, 1907.)

[93 Pac. 268.]

Chattel Mortgages—Domestic Animals—Ownership of Increase.

Chattel Mortgages—Liens—Title.

1. A chattel mortgage creates a lien only, and, therefore, does not pass title from the mortgagor to the mortgagee.

Same—Domestic Animals—Increase—Ownership.

2. A chattel mortgage upon cows, in which no mention was made of their increase, did not cover their calves, in gestation at the time of the execution of the mortgage but born prior to foreclosure.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION by Alexander L. Demers against Davis Graham, sheriff, and others. From a judgment for plaintiff, defendant M. H. Prideaux appeals. Reversed and remanded.

Mr. Harry H. Parsons, for Appellant.

Citing: *Shoobert v. De Motta*, 112 Cal. 215, 53 Am. St. Rep. 207, 44 Pac. 487; *Maier v. Freeman*, 112 Cal. 8, 53 Am. St. Rep. 151, 44 Pac. 357; *First Nat. Bank v. Ereca*, 116 Cal. 81, 58 Am. St. Rep. 133, 47 Pac. 926; *Alferitz v. Borgwardt*, 126 Cal. 205, 58 Pac. 460; *Alferitz v. Ingals*, 83 Fed. 964; *Hixon v. Hubbell*, 4 Okla. 224, 44 Pac. 222; *Knowles v. Ferguson*, 11 Or. 54, 240, 4 Pac. 126.

Messrs. Marshall & Stiff, for Respondent.

“Under the rule that the incident follows the principal, a mortgage of domestic animals covers the increase of such animals, though it is silent as to such increase.” (Jones on Chattel Mortgages, sec. 149; *Rogers v. Highland*, 69 Iowa, 504, 58 Am. Rep. 230, 29 N. W. 429; *Darling v. Wilson*, 60 N. H. 59, 49 Am. Rep. 305; *Funk v. Paul*, 64 Wis. 35, 54 Am. Rep. 576, 24 N. W. 419; Lawson’s Rights, Remedies and Practice, sec. 1370; *Pyeatt v. Powell*, 51 Fed. 551, 2 C. C. A. 367; *Dyer v. State*, 88 Ala. 225, 7 South. 267; *Gundy v. Biteler*, 6 Ill. App. 510; *Forman v. Proctor*, 48 Ky. 124; *First Nat. Bank v. Western Mtg. & Inv. Co.*, 86 Tex. 636, 26 S. W. 488; see, also, *Thorpe v. Cowles*, 55 Iowa, 408, 7 N. W. 677; *Maize v. Bowman*, 93 Ky. 205, 19 S. W. 589, 17 L. R. A. 81; *Dyer v. State*, 88 Ala. 225, 7 South. 267; *Forman v. Proctor*, 9 B. Mon. (Ky.) 124; *Rogers v. Highland*, 69 Iowa, 504, 58 Am. Rep. 230, 29 N. W. 429; *Kellogg v. Lovely*, 46 Mich. 131, 41 Am. Rep. 151, 8 N. W. 699; *Edmonston v. Wilson*, 49 Mo. App. 491; *Funk v. Paul*, 64 Wis. 35, 54 Am. Rep. 576, 24 N. W. 419; *Latta v. Fowlkes*, 94 Tenn. 219, 29 S. W. 124; *Darling v. Wilson*, 60 N. H. 59, 49 Am. Rep. 305.)

MR. JUSTICE SMITH delivered the opinion of the court.

The only question for determination in this case is, whether a chattel mortgage of certain cows covers their calves in gestation at the time the mortgage was executed, but born prior to foreclosure, there being no reference in the mortgage to the increase of the cows.

The defendant, Graham, holds in his possession, as sheriff of Missoula county, the sum of \$609, the proceeds of the sale of eighty-seven calves, sold by him under a stipulation that he should hold the proceeds until the final determination of this action. The plaintiff claims the money by virtue of the fact that he held a chattel mortgage on the mothers of the calves at the time the young were born. The appellant, Prideaux, claims to be entitled to the sum by virtue of a sale of the calves to him by Sloan, the mortgagor, after the sheriff had seized but before he sold the same under plaintiff's mortgage. Prideaux set forth in his answer the respective claims of the parties, as above recited. The district court of Missoula county sustained a general demurrer to the answer, and, in default of further pleading by Prideaux, entered a judgment in favor of the plaintiff and against the defendant Graham, as sheriff, for the sum of money in dispute. From that judgment Prideaux has appealed.

The law is well settled in this state that a chattel mortgage only creates a lien and does not pass title from the mortgagor to the mortgagee. (*Bennett Bros. Co. v. Fitchett*, 24 Mont. 457-469, 62 Pac. 780; *Mueller v. Renkes*, 31 Mont. 100, 77 Pac. 512.) Such lien transfers no title. (Civ. Code, sec. 3750.) The question of the extent of the lien created, in those jurisdictions where no title passes, has been a fruitful source of litigation for many years. The immediate question that we are to decide has never been before this court, and we feel, therefore, that in the determination of the same we should point out what seem to us to be the principles involved, and not merely cite the precedents of the courts.

The supreme court of California, in the case of *Shoobert v. De Motta*, 112 Cal. 215, 53 Am. St. Rep. 207, 44 Pac. 487, took occasion to examine and differentiate the decisions on this subject in the following language: "It has been held in some states that the lien of a mortgage of domestic animals extends to the increase of the animals during the life of the mortgage, whether the terms of the mortgage include such increase or not, and, following these decisions, such a rule is stated in text-books upon chattel mortgages. It will be found, however, upon examination of these cases, that the decisions therein are based upon the principle of the common law, which was in force in those states, that by the mortgage the mortgagee is vested with the title to the mortgaged property, and becomes the owner thereof; and that in the case of domestic animals, applying another rule of both the common and the civil law, that 'the brood belongs to the owner of the dam or mother,—*partus sequitur ventrem*' (2 Blackstone's Commentaries, 390), he thereby becomes the owner of such increase, and, being the owner, his title in any action at law must prevail. The earliest application of this rule was in the case of a mortgage of a female slave (*Hughes v. Graves*, 1 Litt. 317), which was decided in Kentucky in 1822, and was afterward followed in Maryland in 1836, in the case of *Evans v. Merriken*, 8 Gill & J. 39, which also involved the offspring of a female slave which had been mortgaged; and these cases are cited as the authority upon which cases involving the same question have been decided in other states, in some instances referring also to the principle upon which the rule rests, and in others merely referring to the cases as an authority. (*Cahoon v. Miers*, 67 Md. 573, 11 Atl. 278; *Gundy v. Biteler*, 6 Ill. App. 510; *Ellis v. Reaves*, 94 Tenn. 210, 28 S. W. 1089.) The rule has also been stated in many other cases in which the question was neither involved nor decided (*Kellogg v. Lovely*, 46 Mich. 131, 41 Am. Rep. 151, 8 N. W. 699; *McCarty v. Blevins*, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262; *Gans v. Williams*, 62 Ala. 41); and there is still another line of decisions in which it has been sought to uphold the propriety of the

rule by holding that the increase which was in gestation at the execution of the mortgage was inferentially included therein as a part of the mortgaged property. (*Funk v. Paul*, 64 Wis. 35, 54 Am. Rep. 576, 24 N. W. 419; *Rogers v. Hyland*, 69 Iowa, 504, 58 Am. Rep. 230, 29 N. W. 429; *Edmonston v. Wilson*, 49 Mo. App. 491.) Another line of decisions limits this application of the rule by holding that the increase is subject to the lien of the mortgage only for so long a time as the young are in a state of nurture from the mother. (*Rogers v. Gage*, 59 Mo. App. 107; *Darling v. Wilson*, 60 N. H. 59, 49 Am. Rep. 305; *Forman v. Proctor*, 9 B. Mon. (Ky.) 124.) The want of logical sequence in this limitation has been felt by the courts, and some of them have sought to place their decision upon the fact that, while the young were following the mother, a purchaser from the mortgagor had notice by that fact that it was her offspring, and subject to the mortgage, and was thus prevented from claiming to be a purchaser in good faith. Placing the decision on this ground is, however, necessarily a repudiation of the principle upon which all the above cases rest, for, if the mortgagee is in fact the owner of the increase, the question of good faith in a purchaser from the mortgagor is immaterial.

“Prior to 1873 the giving of a chattel mortgage in this state vested the mortgagee with the title to the property mortgaged (*Heyland v. Badger*, 35 Cal. 404), and, while this rule of law prevailed, the foregoing decisions would have been applicable. The Civil Code, however, went into effect at the beginning of that year, and under its provisions the mortgagor is not, by the execution of the chattel mortgage, divested of his title to the property, but still remains its owner, while the mortgagee has only a lien thereon. (Civ. Code, sec. 2888; *Bank of Ukiah v. Moore*, 106 Cal. 673, 39 Pac. 1071.) Consequently, the foregoing decisions cannot be regarded as having authoritative force, but the rights of the parties must be determined upon the general principles controlling the relations between a mortgagor and mortgagee. In the absence of any express agreement upon the subject, the lien created by a mortgage is limited to the prop-

erty which is described in the mortgage, and does not include other property of the same character which the mortgagor may have afterward acquired and placed with the mortgaged property. (Jones on Chattel Mortgages, secs. 138, 154.) If the mortgagor retains the possession of the mortgaged property, he is at liberty to deal with and use it as its owner, and whatever income or profit may be derived from such use belongs to him, and not to the mortgagee. (See *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484.) If, in the case of sheep, the use to which he puts the ewes is for breeding lambs, there can be no sufficient reason given why the lambs that are dropped by the ewes should belong to the mortgagee, any more than the wool which is sheared from their backs. We are aware that the supreme court of Texas, in *First Nat. Bank v. Western Mortgage etc. Co.*, 86 Tex. 636, 26 S. W. 488, held that, although by the laws of that state the mortgagor of personal property remains the owner thereof after the execution of the mortgage, the foregoing decisions control the right of the mortgagee to the increase of domestic animals; but the opinion in which the decision is given merely states the proposition without presenting any reasoning in its support, and does not meet with our approval. We are not called upon to determine in the present case whether, if the lambs in question had been in gestation at the date of the mortgage, they would have been included as a part of the property mortgaged, but we hold that, inasmuch as they were begotten upon the ewes after the mortgage was executed, the mortgagee has no lien upon them, or right to their possession."

This case was supplemented by the later case of *First Nat. Bank v. Erreca*, 116 Cal. 81, 58 Am. St. Rep. 133, 47 Pac. 926, wherein the facts relative to the time at which the offspring were begotten are like those in the case at bar. In that case the court said: "The present case presents a question which was not involved or decided in that case, i. e., whether the lien of the mortgage includes lambs in gestation at its date, but upon the principles of that case it must be held that they are not so

included. As the lien of the mortgage extends only to the property described therein, and as the mortgagor remains the owner of the property mortgaged, he has an unrestricted right to sell or dispose of its fruit or increase. His right to dispose of lambs in gestation or wool upon the backs of the sheep at the date of the mortgage is the same as would be his right to dispose of oranges which were on the trees, or wheat which was in the ground or standing in the field when a mortgage of the land was made."

We think these cases correctly state the rule of law, and we adopt the conclusions reached, together with the reasons assigned therefor.

Section 3893 of the Civil Code reads as follows: "The increase of property pledged is pledged with the property." Counsel for appellant contends that this legislative language ought to be interpreted as showing an intention to lay down a different rule as to pledges from that pertaining to chattel mortgages. We are inclined to think there is merit in the suggestion.

On the part of the respondent our attention has been directed to section 3815 of the Civil Code, reading as follows: "A mortgage is a lien upon everything that would pass by a grant of the property." It is contended that the foregoing language, applied to this case, means that the lien of the mortgage attached to the calves in question. This section is found in the Code under the following article-heading: "Mortgages in General." It applies, therefore, to both real estate and chattel mortgages. There is this analogy between real estate and chattel mortgages, that both are simply liens. (*Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782.) A mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage. (Civ. Code, sec. 3816.)

While in possession of mortgaged real property the mortgagor may collect and appropriate to his own use the rents and profits thereof. (20 Am. & Eng. Ency. of Law, 2d ed., p. 979, and cases cited.) Growing crops may be the subject of chattel mort-

gage, even though the owner of the same also owns the land upon which they are growing. And this rule prevails, even in those jurisdictions where growing crops are part of the realty. (8 Am. & Eng. Ency. of Law, 2d ed., 311; Civ. Code, sec. 3876.) Now, it will not be contended that a grant of the land would not pass title to a growing crop. So, too, the sale of a cow would undoubtedly carry with it her unborn calf; but we cannot assent to the conclusion that because thereof, a chattel mortgage describing the cow only would also create a lien upon her offspring.

The statute referred to by the learned counsel is comprehensive, and the construction to be placed upon it should be reached only after full consideration in any particular case in which it may be invoked. We do not think it wise or necessary in this case to construe it further than to hold that it does not apply to the natural increase of domestic animals by procreation. We think, if the legislature had intended that the lien of a chattel mortgage describing particular animals should attach to their young thereafter to be born, it would have said so plainly, as it did in the case of a pledge. In the absence of such a declaration it seems reasonable to hold that because the mortgage is simply a lien passing no title, the mortgagor in possession has the right to deal with the property as his own, and in the case of domestic animals may dispose of the young not mentioned in the mortgage as he sees fit. This construction leaves to the mortgagee the security described in the mortgage, and does away with the confusion that experience has taught invariably follows the adoption of any other rule. If, in cases like this, it be intended to include the offspring, the mortgage should so state.

The judgment of the district court of Missoula county is reversed and the cause is remanded, with instructions to vacate the order sustaining the demurrer to the appellant's answer, and to enter an order overruling the same.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

36	410
138	418
36	410
40	324

SCHAEFFER, RESPONDENT, v. GOLD CORD MIN. CO., AP- PELLANT.

(No. 2,463.)

(Submitted January 14, 1908. Decided January 18, 1908.)

[93 Pac. 344.]

Default Judgments—Setting Aside—Affidavits of Merits—Insufficiency—Demurrer.

Default—Application to Set Aside—Requisites.

1. A party defendant, on application to set aside his default, must, in addition to excusing his delinquency, support the motion by an affidavit of merits setting forth the facts constituting his defense, or tender with the motion and affidavit a copy of his proposed answer.

Same—Affidavit of Merits—Insufficiency.

2. An affidavit, filed in support of an application to open a default, which recited that the president of the defendant corporation "fully and fairly stated the case" to affiant, defendant's attorney, and that affiant "says that said defendant has a good and meritorious defense," was not a statement of facts from which the district court could determine that the defendant had, *prima facie*, a defense upon the merits, and a denial of the application was proper.

Same—Setting Aside—Demurrer.

3. Courts will not open a default to allow the interposition of a demurrer.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Hulda Schaefer against the Gold Cord Mining Company. From a default judgment for plaintiff, and from an order denying a motion to set the judgment aside, defendant appeals. Affirmed.

STATEMENT OF THE CASE BY THE JUSTICE DELIVERING THE OPINION.

In December, 1906, this action was commenced in the district court of Lewis and Clark county by filing a complaint and having a summons issued. Service of summons was made upon the defendant on February 14, 1907, by delivering to an officer of

the defendant a copy of the summons together with a copy of the complaint. The return of the sheriff, made on the last-mentioned date, however, recited that such service had been made by delivering to the president of the defendant company a copy of the summons. On March 1st the sheriff made application to the judge of the district court for permission to withdraw the summons from the files and correct the return to conform to the facts, and, such permission having been granted, an amended return was indorsed upon the summons, which recites that service of summons was made by delivering to the secretary of the company a copy of the summons together with a copy of the complaint. On March 9, 1907, the plaintiff had the default of the defendant entered for failure to appear and answer or demur, and a judgment was thereupon rendered and entered in favor of the plaintiff for the relief demanded in the complaint.

On April 5th the defendant moved the court to vacate the judgment, set aside the default, and permit the defendant to "appear, answer, or demur to the complaint." The ground of the motion was that the sheriff's return had been amended without notice to the defendant, that the defendant had relied upon the defective return first made, and had not appeared in the action within the time allowed by law. This motion was supported by an affidavit of counsel for defendant showing the principal facts set forth above, and which affidavit also recites: "That deponent further says that on or about the 16th day of February, 1907, as aforesaid, E. A. Wetmore, Esq., the president of the said defendant corporation, fully and fairly stated the case in this cause to the undersigned, its counsel, of Helena, Mont., and after such statement was advised by them that the defendant corporation had a good and substantial defense on the merits of the action, and that deponent verily believes the same to be true, and this deponent says that said defendant has a good and meritorious defense to said action." Upon consideration, this motion was denied, and defendant appealed from the judgment and from the order denying its motion.

Messrs. Wight & Thompson, for Appellant.

Mr. Charles E. Pew, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

It may be said to be the settled doctrine in this state that in an instance of this character, where a party defendant in default applies to the court to have the default set aside, he must, in addition to excusing his default, support his application by an affidavit of merits setting forth the facts constituting his defense, or tender with his motion and affidavit a copy of his proposed answer. (*Donnelly v. Clark*, 6 Mont. 135, 9 Pac. 887; *Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739.) And there is good reason for this rule. A court would not be justified in setting aside a judgment manifestly just. In order to move the court the defendant must make it appear *prima facie* that the action sought is in the interest of justice; for section 774 of the Code of Civil Procedure gives to the court power to relieve against a judgment entered by default, only when such relief is in furtherance of justice, and it is from such affidavit of merits, or proposed answer, that the trial court is to determine whether the defendant has *prima facie* a defense upon the merits.

The statement in the affidavit filed in this instance, that the defendant, by its president, "fully and fairly stated the case in this cause to the undersigned, * * * and this deponent says that said defendant has a good and meritorious defense to said action," is not a statement of facts, and could not enlighten the court upon the subject of the defense intended to be made. Indeed, the defendant did not ask to be permitted to answer the complaint, but did ask to have the default set aside, and that it be permitted to answer or demur. Courts do not open defaults in order to allow demurrers to be interposed. (*Bowen v. Webb*, above.)

While there is also an appeal from the judgment, no contention is made that the complaint does not state facts sufficient to

constitute a cause of action. Appellant's brief is devoted exclusively to a consideration of the appeal from the order.

In the absence of an affidavit of merits setting forth the facts constituting the defendant's defense, or a copy of the answer proposed, the district court did not abuse its discretion in refusing to set aside the default, and the judgment and order are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

WHITE ET AL., RESPONDENTS, v. BARLING, APPELLANT.

(No. 2,478.)

(Submitted January 16, 1908. Decided January 25, 1908.)

[93 Pac. 348.]

36	413
37	484
37	573
38	365

36	413
41	36

Water Rights—New Trial—Appeal—Findings—Insufficiency of Evidence—Discretion—Jury—View of Premises.

New Trial—When Order Granting It will be Affirmed.

1. Where a motion for a new trial is based upon a number of grounds, and the court, in granting it, does not specify the particular one upon which it does so, its action will be approved on appeal if justified upon any one or more of the grounds of the motion.

Same—Findings—Evidence—Insufficiency—Discretion.

2. A motion for a new trial, on the ground that the findings are not supported by the evidence, is addressed to the sound legal discretion of the trial court, and its order will not be disturbed, except in a case of manifest abuse of such discretion.

Same.

3. Where the evidence in a water right suit did not preponderate in favor of a finding, attacked upon a motion for a new trial for insufficiency of the evidence to sustain it, but was conflicting and of such a character that different courts might reasonably have differed as to the weight of it, an order granting the new trial will be affirmed.

New Trial—Equity Cases—Findings—Modification.

4. A litigant, in an equity case, has the right to move for a modification of a finding, or ask for a new trial; hence, a trial court cannot dictate to the moving party to pursue the former method, so as to save the trouble and expense of a retrial.

Water Rights—Ditches—View by Jury—Findings—Evidence—Insufficiency—New Trial.

5. The fact that in a water-right suit, in which one of the principal questions at issue was the capacity of a ditch as of the date of

appropriation,—three years and seven months prior to the date of trial,—the jurors were permitted to view the premises, was no ground for the denial of a motion for a new trial, based upon the insufficiency of the evidence to sustain a finding upon the question, where it appeared that in the interim between the date of appropriation and the time of trial the ditch had become greatly out of repair, so that the view had by the jury could not have been of much, if any, assistance to them in determining its capacity at the date of appropriation.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

ACTION by William D. White and another against Fred W. Barling. Judgment for defendant, and from an order granting a new trial to plaintiffs, he appeals. Affirmed.

STATEMENT OF THE CASE BY THE JUSTICE DELIVERING THE
OPINION.

This is an action to determine the relative rights of the parties to the use of the waters of Blue creek, a tributary of Yellowstone river. Upon the trial a large number of special interrogatories were submitted to the jury and answered. These special findings were approved by the court, and a decree in conformity therewith rendered and entered. The plaintiffs then moved for a new trial, specifying as one of the grounds, among others, insufficiency of the evidence to sustain certain of the findings. The court, in an order general in its terms, sustained the motion, and the defendant has appealed from the order granting a new trial.

Mr. T. S. Hogan, and Mr. M. J. Lamb, for Appellant.

Mr. O. F. Goddard, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

It must be conceded to be the rule, now firmly established in this jurisdiction, that, where a trial court has granted a motion for a new trial in an order such as the one

before us, which does not specify the particular ground upon which it was granted, the action will be approved by this court, if it was justified upon any one or more of the grounds of the motion. (*Walsh v. Conrad*, 35 Mont. 68, 88 Pac. 655; *Fournier v. Coudert*, 34 Mont. 484, 87 Pac. 455; *Case v. Kramer*, 34 Mont. 142, 85 Pac. 878; *Gillies v. Clarke Fork Coal Min. Co.*, 32 Mont. 320, 80 Pac. 370; *Wright v. Mathews*, 28 Mont. 442, 72 Pac. 820; *Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 65 Pac. 106.) It is also well settled that a motion for a new trial, upon the ground that the findings are not supported by the evidence is addressed to the sound legal discretion of the trial court, and its order will not be disturbed, except in a case of manifest abuse of such discretion. (*Fournier v. Coudert*, above; *Case v. Kramer*, above; *Vogt v. Baldwin*, 20 Mont. 322, 51 Pac. 157; *Murray v. Heinze*, 17 Mont. 359, 42 Pac. 1057; *Haggin v. Saille*, 14 Mont. 79, 35 Pac. 514.)

One of the principal questions in issue in this case was the capacity of a certain ditch owned by the plaintiffs, and by means of which they conveyed water to their lands; and it was of particular importance to determine the capacity of this ditch at the date of defendant's appropriation, September 19, 1902, which was three years and seven months prior to the date of the trial. The jury found that such capacity was thirty miners' inches, and this finding (No. 28) was approved by the court. Upon motion for new trial this particular finding was attacked, as were others, and, after a hearing, the trial court granted the motion.

Upon the question submitted, and of which finding No. 28 is the answer, the evidence offered by the respective parties was extremely conflicting, and it appears to us that different courts might reasonably differ as to the weight of the evidence so offered. At least, we are not prepared to say that this record discloses that the evidence upon that subject preponderates in favor of that finding. If the trial court came to the conclusion that finding No. 28 was not supported by the evidence,—that is, that the evidence preponderated against that finding,—

then it was the duty of the court to set it aside. (*Harrington v. Butte & Boston Min. Co.*, 27 Mont. 1, 69 Pac. 102; *Patten v. Hyde*, 23 Mont. 23, 57 Pac. 407.)

But it is said that this finding No. 28, or any other one to which plaintiffs took exception, might have been corrected upon motion to modify the findings, without putting the parties to the trouble and expense of a new trial, and in this appellant is correct. But under our cumbersome practice a litigant in an equity case may move for a modification of the findings, or may move for a new trial, and we know of no rule of law which authorizes a court to dictate to a litigant which method he shall pursue. Plaintiffs did not ask the court for a modification of the findings, but did ask for a new trial, and with their selection of the remedy to be pursued we cannot interfere.

But it is earnestly contended by appellant that, since the trial court directed a view of the premises, and such view was had, the court thereafter abused its discretion in setting aside the findings made. While under some circumstances this argument might be advanced with great force, we think it can hardly be done in this instance. As said above, the effort was directed to a determination of the capacity of plaintiffs' old ditch, as of the date of defendant's appropriation, which was more than three years prior to the date when the jurors viewed the premises; and the evidence tends very strongly to show that during that interval the ditch had become greatly out of repair by reason of stock running over it, the ditch being located for a considerable distance along a hillside. So that, so far as this record discloses, the jurors could not have received very much assistance, if any, by reason of the view of the ditch at the time of the trial.

Appellant relies upon the case of *Ormund v. Granite Mt. Min. Co.*, 11 Mont. 303, 28 Pac. 289, in which case this court reversed the district court for granting a new trial after a view of the premises by the jury. But in the *Ormund Case* it appeared that the only issue was as to whether the plaintiff had made a discovery within the boundaries of his mining claim.

Three or four witnesses swore to the discovery. Thirteen witnesses for the defendant swore to the contrary, and their evidence was not rebutted. Under these circumstances this court held that the trial court abused its discretion in granting a new trial, and, in doing so, said, among other things: "In deliberating upon their verdict, they [the jury] had a right to take into consideration their observations in connection with the evidence. It must be understood, however, that the verdict under these circumstances is not to be treated as conclusive upon any issue."

In *Murray v. Heinze*, above, this court had under consideration an appeal from an order granting a new trial in a case in which the jury had inspected the premises; and, in affirming the order of the trial court, this court reviewed the opinion in the *Ormund Case*, and, among other things, said: "There was in the *Ormund Case* apparently a great preponderance of unrebutted testimony in favor of the defendant and in support of the verdict; but in the case at bar the record shows no such preponderance of unrebutted evidence in support of the verdict. Here there is an irreconcilable conflict upon the material issues, which distinguishes it from the *Ormund Case*." We think this observation pertinent and particularly applicable to the case now under consideration.

In conclusion we quote from the opinion in *Walsh v. Conrad*, above, as applicable to the question first considered above in this case, the following: "Upon this question there was a conflict in the evidence; and, as the trial court, which had the witnesses before it, was in a much better situation to judge of the sufficiency of the evidence to sustain the verdict than is this court, we cannot say that this record discloses any abuse of discretion on the part of the court in setting aside the verdict and granting a new trial."

The order from which this appeal is taken is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STATE EX REL. BRASS, RESPONDENT, v. HORN, POLICE JUDGE,
APPELLANT.

(No. 2,473.)

(Submitted January 15, 1908. Decided January 25, 1908.)

[93 Pac. 351.]

Mandamus—Appeal—Dismissal—Moot Questions—Stay—Supreme Court—Supersedeas—Review.

Mandamus—Appeal—Moot Questions.

1. An appeal from an order granting a writ of *mandamus* to compel the transfer of a cause, the complaint in which charged the violation of a city ordinance, from a police to a justice of the peace court, will be dismissed, where it appears that the mandate of the district court had been fully complied with on the day the appeal was taken, and that the only purpose sought by it was a decision upon a moot question relative to jurisdiction.

Appeal—Its Purpose.

2. The purpose of an appeal is to relieve a party who has been aggrieved by the judgment or order complained of, and to restore him to the position which he occupied in the controversy before the judgment was rendered or the order made.

Mandamus—Appeal—Stay—Supersedeas.

3. Even if a stay, in a case where a writ of mandate is issued by the district court to compel the transfer of a cause from a police to a justice of the peace court, is not provided for in the Code of Civil Procedure (a question not decided), still the supreme court has power, under section 3, Article VIII of the Constitution, to issue a *supersedeas*, or any other appropriate writ, to effectuate its appellate jurisdiction, and thus to insure the aggrieved party an appeal which might otherwise be of no value.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

MANDAMUS by the state, on the relation of John Brass, to compel Charles Horn, as police judge of the city of Helena, to transfer a charge against relator to the nearest justice of the peace of said city. From a judgment awarding the writ, respondent appeals. Appeal dismissed.

Mr. E. C. Russell, for Appellant.

Mr. E. A. Carleton, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On May 20, 1907, the relator was, by complaint filed in the police court of the city of Helena, charged under an ordinance with disturbing the peace. Having been arrested and brought into court, he entered his plea of not guilty, and thereupon made his application to the court, upon affidavit setting forth his grounds therefor, for a transfer of the cause for trial to the nearest justice of the peace in the city. The application was denied. Thereupon he applied to the district court of Lewis and Clark county for a writ of *mandamus* to compel the transfer to be made. After a hearing, the court entered judgment awarding the writ. Thereupon the defendant appealed.

As soon as the record was filed in this court, the relator moved to dismiss the appeal on the ground that the defendant had fully complied with the writ, and thus satisfied the judgment, before the appeal was taken. The motion was directed to be submitted at the hearing on the merits. This has been done.

It appears from the record and briefs of counsel that the defendant fully complied with the mandate of the district court on the same day the appeal was taken, and that the only purpose sought by the appeal is to have this court decide the moot question whether the statutes defining the jurisdiction of police and justice of the peace courts authorize a change of venue from the former to the latter in cases arising under the ordinances of a city and prosecuted in the name of the city.

In *State ex rel. Begeman v. Napton*, 10 Mont. 369, 25 Pac. 1045, this court held that jurisdiction would not be taken of an appeal from a judgment of a trial court directing a writ of *mandamus* to issue, when it appeared that the writ had been issued and obeyed pending the appeal. The court said: "We are of the opinion that it is not a safe precedent to depart from the rule that courts will hear only genuine controversies, and will not tender advice upon matters not in litigation."

In *Snell v. Welch et al.*, 28 Mont. 482, 72 Pac. 988, an injunction had been issued by a district court restraining the de-

fendants from letting contracts under an Act of the legislature providing for a uniform series of text-books for use in the public schools. The defendants appealed. Pending the appeal the parties settled their differences and the contracts were let. The court, on the authority of *State ex rel. Begeman v. Napton, supra*, refused to hear the appeal, saying: "There is nothing in this case now for us to decide. It has been disposed of by the parties themselves pending the appeal."

Again, in *In re Black's Estate*, 32 Mont. 51, 79 Pac. 554, there was an appeal by two of the distributees from a decree of distribution and from an order denying them a new trial. Immediately after the decree had been made and entered, but before the order denying the motion had been made, the appellants made settlement with the administrator, receipting him in full for their distributive shares. Upon this fact being made to appear to this court, the appeals were dismissed. It was held to be an insuperable objection to the entertainment of the appeals that, in case of a reversal of the decree, the parties would not stand relatively in the same position as when the decree was entered, and so the district court could not retry the issues and do justice to the parties.

So here, it would serve no useful purpose to reverse the judgment appealed from, because the cause was, immediately upon the issuance of judgment and service of the writ, transferred to the justice, and has doubtless long since been disposed of. The parties cannot, under these circumstances, be put in *statu quo*. The very purpose of an appeal is to relieve a party who has been aggrieved by the judgment or order complained of, and to restore him to the position occupied by him in the controversy before the judgment was rendered or the order made.

On the ground stated in the motion as well as for the reasons stated in *In re Black's Estate, supra*, we do not think the appeal should be determined on the merits.

But counsel for appellant insists that, since the statutes (Code Civ. Proc., secs. 1726, 1733) do not provide a stay of the execution of the judgment in such cases, and since the defend-

ant was bound to obey the writ at the peril of punishment for contempt (Code Civ. Proc., secs. 1973, 2170; *State ex rel. Coad v. District Court*, 23 Mont. 171, 57 Pac. 1095), an application of the rule of the *Begeman and Snell Cases*, *supra*, will deprive him of his right of appeal, guaranteed under the Constitution (Constitution, sec. 15, Art. VIII, as construed in *Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517, and *Raymond v. Raymond*, 32 Mont. 170, 79 Pac. 1056). We shall not pause to consider the question whether the sections of the statute, *supra*, prohibit, or do not provide for, a stay in such cases. It may be conceded that they do not; yet it does not therefore follow that the defendant may not nevertheless have a stay of execution and therefore an effective appeal. Under another provision of the Constitution (sec. 3, Art. VIII) this court has power to effectuate its appellate jurisdiction by the use of any original or remedial writ which the necessities of a particular case may demand. (*Finlen v. Heinze*, *supra*.) This, of course, includes the power to issue a *supersedeas* or any other appropriate writ in aid of an appeal which would otherwise be ineffectual.

Let the appeal be dismissed.

Dismissed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

36	422
138	221
38	455

STATE, RESPONDENT, v. MCGOWAN, APPELLANT.

(No. 2,469.)

(Submitted January 15, 1908. Decided January 25, 1908.)

[93 Pac. 552.]

Criminal Law—Homicide—Information—Surplusage—Evidence—Admissibility—County Attorney—Misconduct—Instructions—Insanity.

Homicide—Information—Sufficiency.

1. If a person of common understanding would, from the reading of an information, know that the defendant in a given case was charged with murder in the first degree, the defendant will be presumed to have had a like knowledge and be held not to have been prejudiced by the use of peculiar phraseology in it.

Same—Information—Surplusage.

2. Superfluous words or sentences inserted in an information charging crime may be treated as surplusage and disregarded, if, without such words and sentences, it sufficiently charges the offense alleged to have been committed.

Same—Information—Sufficiency.

3. Allegations sufficient for a common-law indictment for murder suffice for an information under the Code.

Same—Information—Surplusage.

4. *Held*, that an information charging that defendant feloniously, willfully, deliberately, premeditatedly and of his malice aforethought made an assault with a gun, etc., loaded with gunpowder and leaden bullets, etc., "thereby, and by thus striking said deceased," etc., but which, while attempting to allege that the gun was discharged by the defendant at and upon deceased, failed of its purpose owing to faulty grammatical construction, was nevertheless sufficient, since the matter relating to the discharge of the gun was surplusage.

Same—Evidence—Admissibility.

5. Where the defense interposed to a charge of murder was insanity, alleged error in the admission of certain shells, taken from the gun with which the crime was said to have been committed, claimed not to have been properly identified and not to be in the same condition as when taken from the gun, was harmless, in view of the offer of the court to defendant's counsel to examine the witness on the subject, which privilege was not taken advantage of, and where, on cross-examination of the witness, no further questions were asked him on the matter.

Same—Evidence—Alias.

6. Nor was the defendant in the above action prejudiced by a ruling of the court refusing permission to prove by certain witnesses that the deceased went by another name than that by which he was known at the time he was killed, where later such fact was brought to the attention of the jury by another witness.

Same—County Attorney—Misconduct.

7. The county attorney, in a prosecution for homicide, asked a witness whether he had a conversation with deceased a short time prior to the killing, in which deceased accused defendant of the crime of larceny. The court not only sustained an objection to the question, but instructed the jury to disregard it. The county attorney thereafter did not persist in propounding incompetent questions. *Held* that no prejudicial error resulted from putting the question.

Same—Witnesses—Impeachment—Laying of Proper Foundation.

8. Where, in a homicide case, a witness for accused testified as to the conduct of decedent and the wife of the accused, while at the hotel of the witness, and the witness on cross-examination denied having told the county attorney that she knew nothing about the case, or about decedent and defendant's wife, except that they came there often for supper, but stated that she had told the county attorney that she knew nothing about the case that would help the state, and that, if she said that accused was jealous of decedent and that there was nothing wrong between decedent and accused's wife, she did not remember it, a proper foundation was laid for the admission of evidence that the witness made the statements that she denied making or denied having any remembrance of.

Same—Exclusion of Evidence—Offer of Proof.

9. Where, in a homicide case, an officer, testifying for the state, deposed that he was not friendly with decedent, an objection to a question, asked on cross-examination, whether the officer had had a warrant for the arrest of decedent which he had not served, was properly sustained, in the absence of an offer of proof showing feeling on the part of the witness, assuming that his feeling in the matter was a proper subject of inquiry.

Same—Evidence—Admissibility.

10. Where, in a homicide case, the issue was whether accused had been rendered insane by reason of deceased having been intimate with the wife of accused, it was competent to inquire into the intimacy and sacredness of the relations existing between accused and his wife, as bearing on the probability of defendant becoming crazed by the misconduct of decedent and the wife of accused.

Same—Language of Court—Harmless Error.

11. Prejudicial error did not result to one on trial for homicide, in which the defense was that accused had become insane by reason of decedent and accused's wife having maintained intimate relations, and where the evidence showed that accused and his wife maintained separate establishments, had divided a part of the property, and had arranged to divide the balance after a specified time, from the language of the court in designating the arrangement as a contract of separation. Though technically incorrect, it was not ground for reversal.

Same—Instructions—Definition of Murder.

12. Where the jury, in a capital case, had been instructed on the definition of murder, it was not necessary to again charge in a later instruction, which told them that if they found that accused had murdered decedent, and they did not find him guilty of murder in the first degree, they should find him guilty of murder in the second degree, that the word "murder" should be construed to mean the offense defined in the Penal Code, as set forth in preceding instructions.

Same—Instructions—Intent.

13. Defendant was not prejudiced by the giving of an instruction on the question of criminal intent, which, among other things, stated

that they should determine whether at the time of the killing defendant had the mental capacity to entertain a criminal act, the court inadvertently substituting the word "act" for "intent," where, in other instructions, the jury had been repeatedly referred to the distinction between the intent of the defendant and the mere act of killing, and told that in every crime there must exist a union or joint operation of act and intent.

Same—Instructions—Use of Word "Crime."

14. The use of the word "crime" in an instruction in several instances, among others in the statement that if the jury believed beyond a reasonable doubt that defendant committed "the crime of which he is accused," was not error as indicating that the court had formed the opinion that the necessary elements of the offense had been proven against the defendant, since the jury must have understood that the words "of which he is accused" qualified the term "crime" wherever used in the instruction.

Same—Instructions—Insanity.

15. The statement in an instruction, given in a trial for homicide, on the subject of insanity, that if defendant was mentally capable of choosing either to do or not to do the act constituting the crime of which he was charged, and of governing his conduct in accordance with such choice, a verdict of guilty should be rendered, even though the jury believed that at the time of the commission of the crime he was not entirely and perfectly sane, was correct.

Same—Instructions—Manslaughter.

16. Where the evidence in a trial for homicide showed that defendant was either guilty of deliberate murder or not guilty by reason of insanity, which was the only defense interposed, the failure of the court of its own motion to give an instruction on the crime of manslaughter was not error.

Appeal from District Court, Teton County; J. E. Erickson, Judge.

DANIEL MCGOWAN was convicted of murder in the second degree, and he appeals from the judgment and an order denying him a new trial. Affirmed.

Mr. J. W. Freeman, and Mr. J. G. Bair, for Appellant.

Mr. Albert J. Galen, Attorney General, and Mr. E. M. Hall, Assistant Attorney General, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

The above-named defendant was convicted in the district court of Teton county of the crime of murder in the second degree, and from a judgment of conviction and an order denying his motion for a new trial he has appealed.

The first contention of his counsel is that the information does not state facts sufficient to constitute a public offense, and is not direct and certain as to the particular circumstances of the offense sought to be charged. These questions were raised by demurrer in the court below. The charging part of the information reads as follows: "That the said Daniel McGowan, of the county of Teton, on the 18th day of March, A. D. 1906, at the county of Teton, in the state of Montana, in and upon one Charles Arnold, then and there being, did feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought make an assault with a certain shotgun, which then and there was loaded with gunpowder and leaden bullets, and by him, the said Daniel McGowan, had and held in both his hands, he, the said Daniel McGowan, did then and there feloniously, willfully, deliberately, premeditatedly, and with his malice aforethought shoot off and discharge at and upon the said Charles Arnold thereby, and by thus striking the said Charles Arnold with the said leaden bullets inflicting on his back mortal wounds, of which said mortal wounds the said Charles Arnold died on the 18th day of March, A. D. 1906, in the county of Teton, state of Montana. And so the said Daniel McGowan, in the manner and form aforesaid, did feloniously, willfully, deliberately, premeditatedly, and with his malice aforethought kill and murder the said Charles Arnold," etc. It will be observed that the charge is not expressly made that the *shotgun* was shot off and discharged at and upon the body of Charles Arnold, and this is the point made by the defendant. It is evident that the pleader omitted the word "which" between the word "hands" and the word "he."

The information being so drawn, it becomes necessary to analyze the charging part thereof, in order to determine whether or not the statutory requirements have been complied with. Section 1832 of the Penal Code provides that an information must contain a statement of the facts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is in-

tended. This statute embodies two provisions: (1) There must be a "statement in * * * language" and (2) that statement must be so framed as to enable a person of common understanding to know what is intended. Now, we apprehend that, although a person of common understanding may know what is *intended* to be charged, that knowledge must be based upon the language employed; otherwise, the statute is not satisfied.

In this case we undertake to say that a person of common understanding would know that the defendant was charged with murder in the first degree. The defendant is therefore presumed to have had that knowledge, and he was in no way prejudiced by the peculiar phraseology of the information. But, unless the pleader employs language embodying the charge intended to be made, he falls short of compliance with the statute; otherwise, the defendant would be charged by mere inference, which may not be done.

Recurring, then, to the information, and omitting certain parts thereof, we find that defendant is accused of the crime of murder as follows: "That the said Daniel McGowan, on the 18th day of March, 1906, * * * at the county of Teton and state of Montana, in and upon one Charles Arnold, then and there being, did feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought make an assault with a certain shotgun, which then and there was loaded with gunpowder and leaden bullets, and by him, the said Daniel McGowan, had and held in both his hands, * * * thereby and by thus striking the said Charles Arnold with the said leaden bullets inflicting on his back mortal wounds, of which said mortal wounds the said Charles Arnold died on the 18th day of March, 1906." We have omitted these words: "He, the said Daniel McGowan, did then, and there feloniously, willfully, deliberately, premeditatedly, and with his malice aforethought, shoot off and discharge at, and upon, the said Charles Arnold."

Is it permissible, under the rules of criminal pleading, to omit the foregoing? It will not be contended that the words last quoted mean anything standing alone, because there is no

allegation there that McGowan discharged any weapon at Arnold. We are to inquire, then, whether in construing the information we are allowed to treat them as surplusage, and whether without them the information charges murder. Section 1842 of the Penal Code provides that no information is insufficient by reason of any defect or imperfection in matter of form which does not tend to prejudice a substantial right of the defendant upon its merits. If the information, without the words last quoted, sufficiently charges murder, then those words may be treated as surplusage and disregarded. (*State v. Phillips*, 36 Mont. 112, 92 Pac. 299; *State v. Mitten*, 36 Mont. 376, 92 Pac. 969.)

The words that we have in mind to disregard involve simply an attempt to state the manner in which the shotgun was used in the assault. There is no allegation that the gun was discharged. In the case of *Ray v. State*, 108 Tenn. 282-295, 67 S. W. 553, 556, the court said: "It is insisted that the indictment is too vague as to the manner in which the deceased was killed, because, under the language used in the indictment, he might have been scared to death, which would not be murder in the first degree, or he may have been beaten to death. We think the language is broad enough to convey the idea of a battery. The indictment in this case charges that the prisoner, 'with a certain dangerous weapon, to wit, a gun, which he in his hands then and there had and held, in and upon the body of one Gene Prentiss feloniously, willfully, deliberately, and premeditatedly, and with malice aforethought did make an assault upon the body of said Gene Prentiss, and did then and there unlawfully, * * * by the means and in the manner aforesaid, kill and murder the said Gene Prentiss, against the peace and dignity of the state.' The charge that the defendant did then and there kill and murder him implies battery, and is sufficient. It is true that murder must be committed by an act applied to or affecting the person, either directly, as by inflicting a wound, or indirectly, as by exposing the person to a deadly agency or influence, from which death ensues. (*Com-*

monwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.) The working upon the fancy of another, or treating him harshly or unkindly, by which he dies of fear or grief, would not constitute this offense. (*State v. Turner*, Wright (Ohio), 20.) At common law it was only necessary to charge that A B, on a certain day and year, feloniously, willfully, and of his malice aforethought, did kill and murder one C. D. * * * In an indictment for murder in the first degree, it is not necessary to state in so many words that the pistol was loaded with powder and ball, or that the wound was made with the ball; nor is it necessary to charge that the wound was inflicted with a particular weapon." (See, also, 21 Cyc. 845.)

In the case of *Alexander v. State*, 3 Heisk. (Tenn.) 475, it was held that an indictment for murder which did not specify the weapon used was good. The court said: "The assault recited is not the gravamen of the charge. That is only inducement to the real charge, which is that of killing and murdering; and, as the assault was followed by killing and murder as its consequence, it is not necessary to state the weapon with which the assault was made or the killing consummated." The information in the case at bar is much more specific in its allegations than was the indictment in the case last cited.

The supreme court of Georgia has decided that, in an indictment for murder by shooting with a pistol, it is not necessary to aver that the pistol was loaded with gunpowder and a leaden ball, or that the fatal wound was inflicted with a ball. (*Peterson v. State*, 47 Ga. 524.)

Murder, in this state, is the unlawful killing of a human being with malice aforethought. Allegations sufficient for a common-law indictment for murder are sufficient for an information under the statute. (*Territory v. Stears*, 2 Mont. 324; *State v. Lu Sing*, 34 Mont. 31, 85 Pac. 521.)

We are of opinion that this information is sufficient to enable a person of common understanding to know what was intended to be charged therein, that that knowledge may be derived from the language employed, and that the defendant was

in no wise prejudiced in any of his rights by the peculiar wording thereof or the employment of words unnecessarily inserted therein.

The next contention urged is that the court erred in admitting in evidence a certain shotgun shell, taken by the witness Connelly from the defendant's gun after the defendant had delivered the gun to a deputy sheriff. After the witness had testified that the shells produced at the trial were the same shells taken from the gun, defendant's counsel objected to the admission in evidence of one of them "as not properly identified," and they now argue that it was not shown that the shell was in the same condition as when taken from the gun. That point was not incorporated in his objection, and was only raised by counsel after the shell had been admitted in evidence, and the county attorney was about to pass it to the jury, and then only by the statement of counsel as follows: "We object, as the shell is not in the same condition, and may not be the same shell he has testified to." We think there is no merit in the contention, especially in view of the fact that the court expressly stated at the time that, if defendant's counsel so desired, they might examine the witness on the subject, of which privilege they did not see fit to avail themselves. On cross-examination, the witness stated that the shell was not in the same condition as when he saw it the night of the shooting; but no further questions were asked him concerning it, and the matter was allowed to rest there. We see no substance to the controversy, viewed from any standpoint, especially in the light of the fact that the defendant did not go upon the witness-stand, there was no denial of the killing, and the defense was insanity.

Defendant complains that he was not allowed to prove by the witnesses Stewart and Duffy that the deceased went by, and was known by, another name than Charles Arnold. Even though this ruling of the trial court may have been error, which we do not decide, no harm was done, because the witness Cook testified that Arnold was also known by the name of Webber.

The county attorney asked the witness Lea the following question: "Did you have a conversation with Mr. Chas. Arnold a few months, or a short time, before he was shot, in which he accused McGowan of the crime of grand larceny?" The court not only sustained the defendant's objection to the question, but instructed the jury to disregard it in arriving at their verdict. There was no persistence on the part of counsel for the state in propounding incompetent questions; and it does not appear from the record that any effort was made to convey information to the jury through the medium of irrelevant interrogatories. Rather, the question appears to have been propounded in good faith, counsel urging that it was competent as bearing upon defendant's motive in killing deceased. The court, with abundance of caution in the protection of defendant's rights, told the jury not to consider the question, and we think no prejudice resulted.

On the part of the defense there was testimony tending to show that the deceased, for some time prior to his death, had maintained illicit relations with the defendant's wife, and had frequently been discovered in her company under such circumstances as to leave no doubt that they were together for the purpose of sexual intercourse. Certain witnesses also testified that the deceased had attempted to hire them to kill the defendant. All of these matters were communicated to the defendant prior to the homicide. It appeared, also, that for some time prior to the killing of Arnold, Mrs. McGowan and her three children lived at the town of Cut Bank, in Teton county, while the defendant lived on his ranch, some miles from the town, only coming to the house occupied by his wife every Saturday, when he would stay over Sunday, and sometimes two or three days longer. A witness, Mrs. Cook, testified for the defendant as to certain acts of the deceased and Mrs. McGowan while at the hotel of the witness at Cut Bank. On cross-examination she said: "I didn't tell Mr. Cole (the county attorney) that I knew nothing about this case whatever, or about Arnold and Mrs. McGowan, except that they came there often

for supper. I told him I knew nothing about this case that would help the state. If I said at that time that Mrs. McGowan had said to me that Dan was jealous of Charley, but there was nothing wrong between them, I don't remember it." In rebuttal, over defendant's objection, the county attorney testified that Mrs. Cook did make the statements that she denied making or having any remembrance of. It appears that the proper foundation was laid for these impeaching questions, and that the subject matter was material. We find no error in the ruling of the court on this objection.

Robert S. Stewart, a deputy sheriff, testified for the state, and in the course of his testimony stated that he was not very friendly with Arnold. Thereupon defendant's counsel asked him: "Is it not a fact that for some time previous to March 17th you had a warrant for his arrest which you did not serve?" The court sustained an objection to the question, and the ruling is assigned as error. Assuming that it was proper to inquire as to the feeling of the witness for or against either the defendant or the deceased, still this question, in itself, did not show to the trial court that the answer would bear upon that subject, and the court properly ruled thereon. Had the defendant placed the same construction upon the inquiry that he now does, he should either have amended his question by incorporating therein the presumed reason for withholding the service of the warrant, or have made an offer of proof covering the point in such a way that the court might intelligently rule thereon.

The state, also in rebuttal, proved, identified, and offered in evidence a paper writing, reading as follows:

"Cut Bank, Mont.

"Dan McGowan, of Cut Bank, Montana, a rancher, and Elisa McGowan, his wife, of Cut Bank, Montana, have agreed together, at Cut Bank, Mont., on this 12th day of December, 1905, and do hereby promise and agree to and with each other, as follows: Dan McGowan, in consideration of the promise and mutual agreement made by Elisa McGowan, does hereby grant,

bargain, and sell all of his interest in the following described personal property, to wit: [Here follows description of certain cattle and horses, and also one wagon and set of double harness.] And Elisa McGowan, for and in consideration of the above agreement, does hereby sell, assign, and transfer all of her interest in the following described personal property, to wit: [Here follows description of certain other cattle and horses and one wagon and team harness.] It being further agreed by and between the parties above mentioned that Elisa McGowan is to have the use of their house in Cut Bank, and that Dan McGowan is and agrees to allow Elisa McGowan 10 dollars for the support of the children she has in her care each month for a period of five months, and after that period a further agreement is to be made by and between Dan McGowan and Elisa McGowan as to the dividing of the balance of their joint personal property and improvements."

The writing bears the following certificate of acknowledgment, signed by a notary public: "On this 12th day of December, 1905, before me, the undersigned, a notary public in and for the county of Teton, personally appeared Dan McGowan and Elisa McGowan and acknowledged to me that they did agree to the foregoing division of the personal property as set forth in the foregoing agreement and that is their own free and voluntary act."

In overruling defendant's objection to this paper, the court said: "I think I will let it go to the jury. It shows that they were living under this contract of separation. That might throw some light upon the question to the jury whether or not the defendant was sane or insane. I think, taken with all the other evidence, it is perhaps competent." It is now contended that the remark of the court, in characterizing the document as a contract of separation, was prejudicial to the defendant. The paper was also objected to as incompetent rebuttal evidence; but we see no force in the objection. The issue being tried was whether the defendant had been rendered insane by the assault of the deceased upon the sanctity of his domestic relations.

It was certainly competent to inquire as to how intimate and sacred those relations were in fact, as bearing upon the liability or probability of defendant's becoming crazed by their destruction; and in view of the fact that the testimony shows that defendant and his wife maintained separate establishments—had, in fact, divided a part of their personal property, and arranged to divide the balance after five months—we find no prejudice to the defendant in the remark of the court, even though the paper was not technically a contract of separation.

Defendant complains of a part of instruction No. 10. It reads thus: "If you find from the evidence beyond a reasonable doubt that the defendant murdered Charles Arnold, and you do not find him guilty of murder in the first degree, you should find him guilty of murder in the second degree. Murder in the second degree is the unlawful killing of a human being with malice aforethought, either express or implied, where the killing is not done deliberately, or with some degree of coolness, or in any one of the ways specified in the definition of murder in the first degree." It is said that the jury should have been told in the same instruction that the word "murder" must be construed to mean the offense defined in the Code, as set forth in other instructions. We think it would be a sad commentary upon our jury system and upon the intelligence of the good citizens of Teton county if we should hold that there was any possibility that this jury did not understand that the defendant was being tried for the crime set forth in the information and as defined by the court, and we, therefore, refuse to so hold.

Instruction No. 24 is objected to. It reads as follows: "You are instructed that in order to be criminally responsible, a person must have intelligence and capacity to have criminal intent and purpose, and if his mental powers are so deficient that he has no will, or no conscience, or no controlling mental power, or if, from the overwhelming violence of mental disease, his intellectual power is for the time obliterated, so that he has not the power or volition to choose to do right and refrain from

doing wrong, he is not criminally responsible; the question to be determined being whether, at the time of the killing, he had the mental capacity to entertain a criminal *act*, and whether, in point of fact, he did entertain it." It will be observed that in the latter part of the instruction the court inadvertently used the word "act," instead of the word "intent." We cannot imagine that the defendant was in any way prejudiced by this instruction, reading all of it. The jury must have known that the court referred to the intent with which the act was committed. The court, in other instructions, repeatedly referred to the intent of the defendant as shown by the evidence, as distinguished from the mere act of killing, and told them that in every crime there must exist a union or joint operation of act and intent. It would serve no useful purpose to quote these instructions, as no complaint is made of them. We are satisfied that the giving of this instruction was not reversible error, and that, as the same reads, it did defendant no harm.

Defendant complains of instruction No. 25, which reads as follows: "You are instructed that if, from all the evidence in the case, you believe beyond a reasonable doubt that the defendant committed the crime of which he is accused in manner and form as charged in the information, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable of choosing either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty, under the law, to find him guilty, even though you should believe from the evidence that at the time of the commission of the crime he was not entirely and perfectly sane." It is said that instead of the word "crime," the court should have employed some such word as "homicide." The defendant's counsel maintain that the use of the word "crime" conveyed to the jury the notion that the court was of opinion that the defendant was guilty of the crime charged against him. While cases may, and sometimes do, arise in which the use of the word "crime" might possibly be con-

strued by the jury as indicating that the court had formed the opinion that the necessary elements of the offense had already been proven against the defendant on trial, we do not think that situation obtained in this case. It is necessary for the trial court, in instructing the jury, to refer to the nature of the accusation made by the state against the defendant, and we think the use of the phrase first employed in this instruction, to wit, "the crime of which he is accused," was appropriate, and that the jury must have understood that the words "of which he is accused" qualified the word "crime" all through the instruction. Counsel also suggest that the words "even though you should believe from the evidence that at the time of the commission of the crime he was not entirely and perfectly sane" are, to quote the language of their brief, "wrong and prejudicial to the rights of the defendant." The use of this language is expressly approved in *State v. Peel*, 23 Mont. 358-368, 75 Am. St. Rep. 529, 59 Pac. 169.

The last assignment of error set forth in the brief of defendant's counsel relates to the failure of the court of its own motion to submit to the jury the question whether the defendant was guilty of manslaughter. No request was made for such an instruction. So far as the evidence shows, there had been no meeting between defendant and deceased for several days prior to the shooting. Arnold was shot in the back, through the glass of a window of a hotel, while he was sitting quietly at the dining-table waiting for food to be served to him. Soon after the occurrence the defendant admitted to several witnesses that he did the shooting. One witness said to him that it was a dirty trick to shoot a man in the back, to which remark defendant replied that he could not take a chance with this man; that he was afraid to. He also told the deputy sheriff that he "got the son of a gun"; and to the witness Woods he said, "I have killed him, and I am not sorry for it." The entire defense was devoted to the question of defendant's mental condition. Under these circumstances, we do not think the court would have been justified in instructing the jury with refer-

ence to manslaughter. The defendant was either guilty of murder, or not guilty by reason of insanity. The only effect of an instruction on manslaughter would have been to give the jury an opportunity to return a compromise verdict, probably meaningless from any logical standpoint, and simply a sort of "splitting the difference" between those jurors who thought the defendant guilty and those who were in favor of acquittal. Such a verdict neither does justice to the defendant nor the state. As was said by this court in *State v. Shadwell*, 26 Mont. 52, 66 Pac. 508, whenever the evidence warrants it, it is the duty of the court to instruct the jury upon every offense included in the crime charged. This rule applies to cases, should any arise, where the trial court has a reasonable doubt about the propriety of such instruction, in which event the instruction should be given. It naturally follows that where the evidence does not warrant and the court has no reasonable doubt, such instruction should not be given, as the giving would only tend to confuse the jury and obstruct the ends of justice.

The record in this case shows that the defendant had a fair and impartial trial. The judgment and order appealed from are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO. v. WHITE
ET AL. KENYON, APPELLANT, v. CANNON ET AL., RESPOND-
ENTS.

(No. 2,429.)

(Submitted January 18, 1908. Decided January 25, 1908.)

[93 Pac. 350.]

*Eminent Domain—Payment of Deposit to Trustee—Nonappeal-
able Orders.*

Eminent Domain—Deposit in Court—Payment to Trustee.

1. In answer to a petition by a trustee holding the legal title to land which had been condemned for railroad purposes, for an order that the money deposited in court for the land be paid to him, one of the beneficiaries under the trust filed an answer alleging that petitioner had mismanaged the affairs of the trust, that an action was then pending for his removal, and asking that payment to him be withheld. The order asked for by the trustee was made. *Held*, that the court's action was correct, since the petitioner, as holder of the legal title, was *prima facie* entitled to the fund, a fact in effect admitted in the pleading of the objecting beneficiary.

Nonappealable Orders.

2. An order authorizing the payment of a fund deposited in court in condemnation proceedings to the person entitled thereto is not a special order after final judgment from which an appeal may be taken.

Same.

3. Nor is the above order one directing the delivery, transfer or surrender of property, within the meaning of section 1722 of the Code of Civil Procedure as amended (Laws 1899, p. 146), authorizing an appeal.

Eminent Domain—Deposit in Court—Persons Entitled.

4. It is only where no dispute arises as to who is entitled to a fund deposited in court in condemnation proceedings that the court can entertain a motion to direct the clerk to pay it over.

Appeal—Right to.

5. To entitle a person to an appeal, he must have been aggrieved by an order or judgment of a court.

*Appeal from District Court, Silver Bow County; Geo. M.
Bourquin, Judge.*

CONDEMNATION proceedings by the Chicago, Milwaukee and St. Paul Railway Company of Montana against W. McC. White and others. From an order directing payment of part of a fund in court to John A. Cannon, trustee, O. E. Kenyon appeals. Dis-
missed.

Mr. W. A. Pennington, and Mr. C. P. Connolly, for Appellant.

Mr. John J. McHatton, for Respondents.

MR. JUSTICE SMITH delivered the opinion of the court.

The above-entitled matter was in this court once before, on the appeal of Mary D. Forbis, as administratrix. (*Forbis, Admx., v. Cannon et al.*, 35 Mont. 424, 90 Pac. 161.) The nature of the proceeding is explained in the opinion, wherein the court said: "We decide that, under the issues raised and tried in the district court, John A. Cannon, the holder of the legal title to the land taken, was *prima facie* entitled to the money that was ordered paid to him, and affirm the order appealed from. We do not decide whether or not it is an appealable order, because that question is not presented in the briefs of counsel. Also, upon the question as to the jurisdiction of the district court to determine the rights of the respective claimants to this money in a summary manner, we express no opinion."

It appears from the record that O. E. Kenyon filed an answer to the petition of Cannon and wife, substantially the same as that of Mary D. Forbis, as administratrix, and he now appeals from the same order from which she appealed. Perhaps, in view of the fact that the language employed in the last sentence of the former opinion may have led the present appellant to believe that upon that appeal the question was given no consideration at all, it is advisable to add something to what was said in *Forbis v. Cannon*. The money was deposited in court by the Chicago, Milwaukee and St. Paul Railway Company of Montana as payment for one hundred and five lots in the city of Butte, the legal title to which was vested in John A. Cannon, as trustee. We held, in effect, that the so-called answers to the Cannon petition set forth no reason why the money should not be paid to Cannon as the person entitled thereto. In other words, no question was raised but that Can-

non was still trustee, and that the lots in question were a part of the trust estate. The so-called answering defendants sought to prevent Cannon from receiving the money, because, in another action pending, they were attempting to have him removed as trustee, after accounting for the trust funds. Had this appellant gone before the district court in answer to the Cannon petition, and alleged facts showing that Cannon was not entitled to the money, we have no doubt the district court would have refused to try the issue thus raised or make any summary order in the premises. But when his own pleading, if such it may be called, admitted in effect that Cannon was still trustee, and that the property of which the money was the proceeds was a part of the trust estate, he admitted that Cannon was *prima facie* entitled to the same.

We suppose there is no question that a trustee is entitled to the possession of the trust estate. How, otherwise, could he be charged with, and required to account for, the same? That is this case. The appellant's so-called answer requested the court to try, on motion, the question whether Cannon had been faithful, or otherwise, to his trust. In fact, it requested the court to try, on motion, the issues involved in the action brought to remove him. If the appellant desired to have this money safeguarded so that Cannon could not dissipate the same, he should, by some appropriate proceeding in the action for an accounting, have invoked the power of the court having jurisdiction in that case to preserve the fund until the final determination of that action. We indulge in the foregoing remarks upon the merits of this matter, because appellant appears to misconstrue the former decision of this court.

Respondents have moved to dismiss the appeal, for the reason that the order appealed from is not an appealable one. That order is not a special order made after final judgment. Neither is it an order directing the delivery, transfer, or surrender of property such as is referred to in section 1722 of the Code of Civil Procedure, as amended by Laws 1899, page 146. The order had no connection with the cause in which it was entitled.

That cause had been finally determined, and the money paid into the hands of the clerk. Any controversy as to the disbursement of the money must necessarily have been determined in another action. The special order, made after final judgment, from which an appeal lies, must be an order affecting the rights of some party to the action, growing out of the judgment previously entered. It must be an order affecting rights incorporated in the judgment. The order appealed from had no connection with the judgment in *Chicago, Milwaukee & St. Paul Ry. Co. v. White*.

It is only in cases where no dispute arises as to who is entitled to the money that the district court has power to entertain a motion to direct the clerk to pay it over. In this case the so-called answers raised no such issue, and the matter stood as though they had not been interposed. Therefore, the court made the order. But it was not appealable, first, because it was not a special order, made after final judgment, such as is contemplated by the Code; and, second, because the appellant was not aggrieved thereby, his rights under the trust agreement remaining in *statu quo*.

The appeal is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

HILL ET AL., RESPONDENTS, v. MCKAY, APPELLANT.

(No. 2,481.)

(Submitted January 17, 1908. Decided January 25, 1908.)

[93 Pac. 345.]

New Trial—Surprise—Affidavit—Insufficiency—Neglect—Diligence—Different Result—Practice.

Practice—New Trial—Motion—Affidavits—Filing—Time.

1. Section 1173, Code of Civil Procedure, allows ten days after notice of motion for a new trial in which to prepare, serve, and file the

affidavits, statement, etc. A finding and decision having been filed August 30, 1905, a written stipulation was made on September 6th that either party might have thirty days' "additional" time in which to give notice of intention to move for a new trial, and ninety days' "additional" time in which to prepare, serve, and file affidavits, bills of exception, or statements in support of the motion. Appellant gave notice of motion for a new trial October 7th, and all the affidavits were filed January 8, 1906. *Held*, that appellant was entitled to thirty days in addition to the four days of the ten-day period not yet expired when the stipulation was made, in which to serve notice of motion for a new trial, and that the ninety days stipulated for in which to file affidavits, bills of exception, or statements, etc., in support of the motion, began to run on the expiration of ten days after the service of notice, and hence that the affidavits were filed in time.

New Trial—Surprise—Showing Necessary.

2. A new trial, asked for on the ground of surprise, will be granted only when it is clearly shown that the movant was actually surprised; that the facts from which the surprise resulted were material, that the verdict or decision resulted mainly from these facts, that the alleged condition was not due to movant's inattention or neglect, that he acted promptly and claimed relief at the earliest opportunity, that he used every means reasonably available at the time of the surprise to remedy its effect, and that the result of a new trial will probably be different.

Same—Surprise—Affidavit—Insufficiency—Neglect.

3. Where, from an affidavit filed in support of a motion for a new trial on the ground of surprise, it appeared only by way of conclusion of affiant what inquiry he made, prior to trial, of two witnesses whose testimony constituted the alleged surprise, or what they told him they would testify to, and in the absence of a positive statement that the witnesses whose conduct was complained of were the only ones called to testify in affiant's behalf in aid of his contention as to a water right (the record on appeal not containing any of the evidence introduced at the trial), and where after trial many other witnesses were found who could furnish the desired evidence, *held*, that the application was properly refused, since from such showing the inference was permissible that movant was negligent in the search for evidence to sustain his contention.

Same—Surprise—Showing—Insufficiency—Diligence.

4. The showing made by the applicant for a new trial on the ground of surprise, referred to in the foregoing paragraph, was further insufficient, for want of prompt action and diligence on his part in an endeavor to avoid the result of the alleged surprise, where he failed to ask for a continuance, or neglected to call the attention of court and counsel to the matter, or ask for a reopening of the cause, which was tried by the court, without a jury, and held under advisement for almost three months before the decision was rendered.

Same—Surprise—Appeal—Record—Different Results.

5. Where, on appeal from an order denying a new trial, asked for on the ground of surprise, occasioned by the testimony of witnesses relied on by appellant to prove his contention, the evidence given at the trial is not incorporated in the record, the supreme court will not order a reversal, since, even conceding that the new witnesses would testify as stated in the movant's affidavit filed in support of the motion, it cannot say that the result reached at the trial would probably be different if a new one were granted.

Appeal from District Court, Madison County; Geo. B. Winston, Judge.

ACTION by Charles C. Hill and others against Fred. Ellinghouse and others. A decree was rendered in favor of plaintiffs, and an order was entered denying the motion of defendant Alex. McKay for a new trial for surprise, from which order he appeals. Affirmed.

Mr. E. B. Howell, for Appellant.

Messrs. Word & Word, and *Mr. E. J. Callaway*, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to obtain a decree adjudicating the respective rights of the parties plaintiff and defendant against each other and among themselves, to the use of the waters flowing in Indian creek, a tributary of Ruby river, in Madison county. Each of the eleven plaintiffs claims separate rights, though they were represented by a single attorney. The eight defendants were represented by the same attorneys, though each filed a separate answer. From this condition of affairs it would seem that the parties plaintiff and defendant made common cause against each other, but, as among themselves, proceeded upon the theory that their respective interests were not conflicting. In any event, the trial resulted in findings of fact and conclusions of law upon each right involved, as to the date of appropriation, the amount thereof, the character of the beneficial use, etc., and a decree was entered accordingly.

The defendant McKay (appellant) is the owner of certain lands situate on Mill creek, another tributary of Ruby river. He also owns a flouring-mill, situate on the same stream, which is propelled by water-power. It seems that the water diverted by him through his mill ditch, and for the irrigation of his

lands on Mill creek, does not, after its release, return to Indian creek, but flows into the channel of Mill creek. The issue at the trial, so far as appellant is concerned, was whether the right asserted by him through his mill ditch was superior to the rights of the other claimants during the season of the year when irrigation was necessary for farming purposes, or whether it was available only during the other portions of the year.

The appellant claims as the successor in interest of one Hall, now dead, who, with others, built the mill and constructed the ditch in 1866. The court found that "it was the intention of those who built the mill ditch and appropriated the waters of Indian creek thereby to use the waters for mill and power purposes when the waters of Indian creek were not needed for irrigation purposes." It was accordingly adjudged that the defendant's use must be confined to the autumn, winter, and early spring months, when the "waters of Indian creek are not required for the proper irrigation of lands." This defendant has appealed from an order denying his motion for a new trial. The ground of his motion was surprise, in that two witnesses, introduced by him to establish his right, made statements at the trial directly contrary to what they had induced him to believe they would make when he had interviewed them to ascertain what their testimony would be touching his right. His affidavit in support of the motion states, in substance, that he was charged by his counsel with the duty of finding and producing witnesses in support of his water-right through his mill ditch; that in performance of this duty he questioned witnesses John Hatfield and William Ferm as to the use of the water in the mill during the time Hall was one of the owners of it; that he questioned them fully, but neither of them disclosed to him any fact or information tending to impair the superiority of his right during Hall's ownership, or tending to show that Hall ever recognized any right in Indian creek superior to the mill ditch right; that, on the contrary, Hatfield, when questioned by affiant as to the conduct of Hall when the farmers without his consent diverted the water from the mill ditch, told him

that Hall "went and took it," meaning and intending that affiant should understand thereby that Hatfield would testify that under such circumstances Hall reclaimed the water, thus asserting the superior right of the mill ditch; that, relying upon the information so given him by Hatfield and Ferm, and believing that they had fully stated the facts to which they would testify, affiant called them to testify in his behalf, and took no steps to secure testimony from other witnesses to establish the facts; that Hatfield testified upon the trial directly contrary to what he had informed affiant prior to the trial, by saying that Hall had an understanding with the farmers below the head of his ditch that when they wanted the water they could take it and shut the mill down; that the farmers took the water whether it was needed for the mill or not; that this arrangement was the result of a bargain, made about the year 1866 with one Bate-man and sundry other persons; that William Ferm testified that Hall had obtained permission from certain unnamed persons to build the mill ditch, with the understanding that when they needed the water it was to be returned to them; that Ferm, being called by plaintiffs as their own witness in rebuttal, testified positively that Hall had told the witness that he used the water from Indian creek with the consent of the people living along the stream below; that both these witnesses constantly associated with the plaintiffs and their witnesses; and, upon information and belief, he charges that their testimony at the trial was the result of collusion with plaintiffs. It is further alleged that if a new trial should be granted, the appellant can produce six witnesses, naming them, whose testimony will show that Hall, his predecessor, always possessed and asserted the right to the use of the mill ditch, to the exclusion of all other rights below the mouth of that ditch. The affidavits of these witnesses were also used in support of the motion, and, generally, support the Hall right, as claimed by the appellant. The plaintiffs filed no counter-affidavits, and hence the statements of the appellant, so far as they are statements of fact, are not controverted.

Do the facts stated make out a case upon which the court should, in its discretion, have granted a new trial? Before proceeding to a determination of this question, however, it is necessary to notice a question of practice, arising upon an objection to the consideration of the affidavits, that they were filed out of time. The findings and decision in the case were filed on August 30, 1905. Of this fact the parties all seem to have had notice. On September 6th the parties, by their attorneys, entered into a stipulation in writing that any one, either of the plaintiffs or defendants, who might be dissatisfied with the decision, might have thirty days "additional" time in which to give his notice of intention to move for a new trial, and also ninety days "additional" time in which to "prepare, serve, and file" affidavits, bills of exception, or statements in support of his motion for a new trial, in case he desired to make such motion. Notice of intention was given by appellant on October 7th. The affidavits were all filed on January 3, 1906. On the hearing of the motion, objection was made that under the terms of the stipulation the affidavits should have been filed within ninety days after September 20th; in other words, since the stipulation was made on September 6th, four days before the time for giving notice had expired (Code Civ. Proc., sec. 1173), the ninety days stipulated for should be computed from the tenth day after the expiration of this period, or from September 20th. The statute, however (section 1173, *supra*, subdivision 1), allows ten days after the notice is given in which to prepare, serve, and file the affidavits, statement, etc., in support of the motion. Since this is so, the ninety days stipulated for for this purpose clearly began to run on the expiration of ten days after the service of notice, else the term "additional," used in the stipulation, can have no significance. The effect of the use of this term in the stipulation extending the time for giving notice (supposing that an extension of time for the giving of this notice may lawfully be made), was to allow thirty days besides the four days of the ten-day period not yet expired. It was so construed by the parties, and prop-

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erly so (*Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418); for there can be no addition where there is not something to which it may be made. The same rule must apply to both extensions.

Coming, now, to the merits of the motion, it is the general rule that a new trial will be granted on the ground of surprise only when it is clearly shown that the movant was actually surprised, that the facts from which the surprise resulted had a material bearing on the case, that the verdict or decision resulted mainly from these facts, that the alleged condition is not the result of movant's own inattention or negligence, that he has acted promptly and claimed relief at the earliest opportunity, that he has used every means reasonably available at the time of the surprise to remedy the disaster, and that the result of a new trial will probably be different. (*O'Donnell v. Bennett*, 12 Mont. 242, 29 Pac. 1044; *Schellhous v. Ball*, 29 Cal. 605; *Doyle v. Sturla*, 38 Cal. 456; *Chicago & Great Eastern Ry. Co. v. Vosburgh*, 45 Ill. 311; *Hull v. Minneapolis St. Ry. Co.*, 64 Minn. 402, 67 N. W. 218; 1 *Spelling on New Trial and Appellate Practice*, sec. 201; 14 *Encyclopedia of Pleading and Practice*, 723.) If, at the time the condition arises, the party can make use of other evidence at hand, or can avoid the threatened disaster by securing a continuance, or by submitting to a nonsuit, he must do so; and not only so, but, after these means have failed, he must by his showing make it clear that his allegation is not a mere pretense to cover his own lack of diligence. As was said in *Schellhous v. Ball*, *supra*: "It is the duty of the courts to look upon applications for new trials upon the ground of surprise with suspicion, for the reason that from the nature of the case surprise may be often feigned and pretended, and the opposite party may be unable to show that such is the case. Hence, the party alleging surprise should be required to show it conclusively, and by the most satisfactory evidence within his reach." In *Chicago & Great Eastern Ry. Co. v. Vosburgh*, *supra*, the court said: "In applications for new trials on such ground it is not only necessary that the party should have been surprised, but that it was in a matter material to

the issue, and that it produced injury to the party; that it was not the consequence of neglect or inattention on the part of the party surprised; also, that he used all reasonable efforts to overcome the evidence which worked the surprise, or that it was not within his power to have done so by the employment of reasonable diligence."

Applying this rule to the appellant's affidavit, we find that it is insufficient in several particulars. It does not appear therefrom, except by way of conclusion of the affiant, what inquiry appellant made of the witnesses whose conduct is complained of; nor does it appear, except in the same way, what they told him they would testify to. Except the statement of Hatfield that Hall said he "went and took it," referring to the water, we have but the conclusion of the appellant as to what the purport of the statements to him by the witnesses were. They may have had the purport and evidentiary value assigned to them by the appellant, but that this is true we cannot say, because the details of them are not before us. The evidence heard by the trial court is not before us. Therefore, we cannot say, except from the statements in the affidavit, that the court based its findings as to the mill ditch mainly upon their testimony. So far as we know, there may have been other evidence in the case, and sufficient to justify the finding, even if the witnesses had testified as appellant supposed they would. For, while we may infer from the affidavit that they were the only witnesses called by appellant, there is no positive statement that such was the case, or that they were the only witnesses who testified as to the mill ditch. From the affidavit, as a whole, coupled with the fact that many other witnesses were found after the trial was over who could furnish the desired evidence, we think the inference permissible that the appellant was negligent in the search for evidence to sustain his contention prior to the trial, and that the judge who decided the motion thought so.

There is a total want of any showing of prompt action and diligence on the part of the appellant in his effort to avoid the result of his alleged surprise at the testimony, when it came

out. He made no application for a continuance. He did not call the attention of counsel to the matter; nor was it called to the attention of the court. It does not appear that he did not have other evidence at hand or within reach which would have been available. In fact, so far as we can judge, he sat silent during the trial, and, though the cause was tried by the court sitting without a jury, and it was held under advisement from June 4th, the date of the trial, until August 30th, the appellant made no application to have the cause reopened, but still remained silent, thinking, no doubt, that the result would be satisfactory. Evidently the surprise upon which he relies is the surprise at the result, rather than at anything that occurred during the trial.

A consideration, which is conclusive, however, is that it is not at all apparent that there is any probability that the result reached by the trial judge would be different if a new trial were granted. As stated above, the evidence is not before us, and though it may be conceded that the new witnesses whose affidavits are embodied in the record would testify as they allege, in the absence of the evidence, we cannot say that a different result would probably be reached.

We are of the opinion that no abuse of discretion is shown, and that the order denying a new trial should be affirmed. It is so ordered.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

RAYMOND, RESPONDENT, v. BLANGGRASS ET AL., APPEL-
LANTS.

(No. 2,467.)

(Submitted January 14, 1908. Decided February 1, 1908.)

[93 Pac. 648.]

*Conversion—Pleadings—Equity—Judgments—Husband and
Wife—Separate Maintenance—Decree—Enforcement—Cred-
itor's Bill.*

Pleadings—Construction.

1. In determining whether a complaint states a cause of action or entitles plaintiff to any relief, matters of form and allegations that are irrelevant or redundant will be disregarded, and if upon any view plaintiff is entitled to any relief, the pleading will be sustained.

Conversion—Complaint—Sufficiency.

2. A complaint which alleges that defendants, at a certain time and place combined and conspired together to hinder and defraud plaintiff in her rights in her husband's property; that, while she had an action pending against her husband for separate maintenance, they wrongfully took and carried away certain sheep then and there the property of her husband and in his possession, does not state a cause of action for conversion; for in such an action plaintiff must allege and prove a general or special ownership in the property and a right to the immediate possession of it at the time of the unlawful taking.

Equity—Decrees—Are Judgments.

3. Decrees in equity are judgments within the definition of section 1000, Code of Civil Procedure, and are, so far as they award a recovery of money, in nowise different from judgments at law.

Same—Decrees—Liens.

4. When properly docketed, a decree in equity becomes a lien upon the real estate of the debtor.

Same—Decrees—How Enforced.

5. A decree in equity directing the payment of money may be enforced by execution in the same manner as a judgment in an action at law.

Husband and Wife—Separate Maintenance—Decree—Enforcement.

6. Where a wife recovers a judgment against her husband for separate maintenance, she becomes his creditor for the amount adjudged due at the time, and for amounts accruing from month to month, occupies toward him the position of any other creditor, is entitled to the same relief in equity, if she seeks the satisfaction of her claim, and may maintain an action at law upon any ground available to any other creditor.

Torts—Creditors—Preventing Satisfaction of Claims.

7. A creditor who has been prevented from having satisfaction of his claim by the wrongful act of a third person, acting with or independently of the debtor, may maintain an action for damages against

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38	172

36	449
38	403

36	449
41	30
41	331
41	395
41	429
41	491

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40	470
40	588

such person for the value of the property put beyond the creditor's reach.

Same—Creditors—Special Injury.

8. A judgment creditor has no cause of action against one who has conspired to defeat his judgment, unless he can show some special injury different from that suffered by other creditors.

Husband and Wife—Separate Maintenance—Conversion—Complaint—Sufficiency.

9. The complaint of a wife, who had obtained a decree against her husband for separate maintenance, in an action to recover damages from third persons for conspiracy, alleged to have been entered into with a view to defeat any decree she might obtain, by removing and disposing of her husband's chattels, was insufficient where it did not appear therefrom that she had any special right in the property, and where the conversion occurred prior to the time she became her husband's creditor by the entry of the decree in the suit for separate maintenance.

Same—Creditors' Bills—Bills of Discovery.

10. A complaint which alleged that the defendants conspired together, pending a suit by plaintiff against her husband for separate maintenance, to defraud plaintiff of her rights in her husband's property and to render ineffective any decree she might obtain against him, but failed to state that the husband assisted in fraudulently disposing of or concealing it, or that plaintiff had acquired a lien on the chattels, or that a trust therein existed in her favor, had none of the attributes of a creditor's bill; nor was it good as a bill of discovery.

Creditors—Causes of Action in Favor of Debtor—Suit.

11. A creditor cannot, solely on the ground that he is a creditor, and that his debtor has no property other than an existing cause of action at law, bring suit upon such cause of action and obtain a judgment thereon as if he were the owner of it.

Execution—Sale—Personal Property—Statutes—Construction.

12. Section 1232, Code of Civil Procedure, relating to sheriff's sale under execution, provides that, when the purchaser of any "real" property, not capable of manual delivery, pays the purchase money, the officer making the sale must execute and deliver to him a certificate of sale. *Held*, that the word "real" in this section was used by mistake, and that the word "personal" should be substituted therefor.

Equity—Adequacy of Remedy at Law.

13. *Held*, that a wife who had obtained a judgment against her husband for separate maintenance had a plain, speedy and adequate remedy at law by execution against persons alleged to have fraudulently conspired to defeat any decrees she might obtain by disposing of the husband's property, and that therefore she could not sue in equity by way of a creditor's bill.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION in equity by Mary Raymond against John Blancgrass and others. From a judgment for plaintiff, John Blancgrass and Philip Chevalier appeal. Reversed.

Mr. C. B. Nolan, and *Mr. I. Parker Veazey, Jr.*, for Appellant Blancgrass. *Mr. A. I. Loeb*, for Appellant Chevalier.

Before a judgment creditor can go into chancery and institute an action such as is brought in this case, provided this is a creditor's bill, the bill must show that all legal remedies have been exhausted. (*Roper v. McCook*, 7 Ala. 318; *Newman v. Willetts*, 52 Ill. 98; *Webster v. Clark*, 25 Me. 315; *Daskam v. Neff*, 79 Wis. 161, 47 N. W. 1132.) Or else facts must be alleged excusing complainant's failure so to do. (*Corey v. Greene*, 51 Me. 114.) Again, the complaint here, if intended as a creditor's bill, is fatally defective in not showing that a lien of some kind existed in favor of the complainant. (14 Am. & Eng. Ency. of Law, 2d ed., p. 324; 5 Ency. of Pl. & Pr., p. 472.)

The complaint is likewise fatally defective if intended as a complaint for a conversion of the property. In order to maintain this action, it was necessary that the pleadings should contain an allegation of a general or special ownership of the property in respondent at the time of the taking by the appellants. There is no such allegation of ownership. (*Glass v. Basin etc. Mining Co.*, 31 Mont. 21, 77 Pac. 302; *Harrington v. Stronberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413; *Babcock v. Caldwell*, 22 Mont. 460, 56 Pac. 1081; *Reardon v. Patterson*, 19 Mont. 231, 41 Pac. 956; *Sawyer v. Robertson*, 11 Mont. 416, 28 Pac. 456; *Wetzel v. Power*, 5 Mont. 214, 2 Pac. 338.)

Mr. E. A. Carleton, for Respondent.

Is a cause of action in tort existing in favor of the insolvent judgment debtor an asset that may be reached by a judgment creditor by creditor's bill? If the transaction out of which the tort arises is tainted with fraud as in this case, equity affords relief to a judgment creditor, and a creditor's bill is the proper remedy. (*Donovan v. Finn*, 1 Hopk. Ch. 59, 14 Am. Dec. 531; *Hadden v. Spader*, 5 Johns. Ch. 280, and 20 Johns. 554; *Harper v. Clayton*, 84 Md. 346, 57 Am. St. Rep. 407, 35 Atl. 1083, 35 L. R. A. 211; *Green v. Keen*, 14 R. I. 388, 51 Am. Rep. 400; 12

Cyc. 27; *Henderson v. Hall*, 134 Ala. 455, 34 South. 840, 63 L. R. A. 673; Bispham on Principles of Equity, 6th ed., p. 652.)

In the following cases, the courts expressly hold that the bill lies to reach a chose in action for the wrongful conversion of, or injury to, the debtor's property: *German Nat. Bank v. First Nat. Bank*, 55 Neb. 86, 75 N. W. 531; *Hudson v. Plets*, 11 Paige Ch. 180; *Williams v. Bank (Or.)*, 90 Pac. 1012; *Cincinnati v. Hafer*, 49 Ohio St. 60, 30 N. E. 197; *Beach v. Bestor*, 45 Ill. 341.

If a creditor's bill lies, is respondent required to secure a lien upon the chose in action before bringing her suit to subject it to the satisfaction of her claim? The answer to this is that the filing of the suit gives respondent all the lien that is required for the maintenance of her suit. (6 Pomeroy's Equity Jurisprudence, sec. 895; *Williams v. Commercial Nat. Bank (Or.)*, 90 Pac. 1012; 12 Cyc. 61; *First Nat. Bank of Amsterdam v. Schuler*, 89 Hun, 303, 35 N. Y. Supp. 171; *Lansing v. Easton*, 7 Paige, 364.) That an equitable lien is created by the filing of the bill is the decision in *In re Pitts*, 9 Fed. 542; see, also, *Butler v. Jeffray*, 12 Ind. 504; *Gordon v. Lowell*, 21 Me. 251. Has plaintiff a remedy at law not exhausted? By "remedy at law" is meant an adequate remedy, since want of an adequate remedy at law "constitutes the very cradle of chancery." (*Wilson v. Harris*, 21 Mont. 400, 54 Pac. 46.)

Appellants contend that respondent has two distinct legal remedies, abundantly ample, and neither of which has been exhausted. The first is the remedy by execution, levying on and selling the sheep, or, in case of inability to do this, then by levying on and selling the chose in action itself. The property converted has disappeared, and the first remedy suggested would have been inadequate. The second remedy at law is the proceedings supplementary to execution. These proceedings, however, afford only a cumulative remedy. They are not exclusive. They do not oust equity of the jurisdiction which it formerly had. (*Ryan v. Maxey*, 14 Mont. 81, 35 Pac. 515; *Wilson v. Harris*, *supra*; 12 Cyc. 6; 6 Pomeroy's Equity Jur-

isprudence, secs. 872, 880, 893; Cooley on Torts, 652; *Rapp v. Whittier*, 113 Cal. 429, 45 Pac. 703; *Lewis v. Chamberlain*, 108 Cal. 525, 41 Pac. 413.) Even had respondent invoked supplementary proceedings, she would have been unable to obtain the relief she desired. Had appellants denied their guilt as to the conversion, as they did in their sworn answers, all the relief the court could give upon supplementary proceedings would be to have directed a suit to have been brought. Respondent would then be in the same situation after those proceedings were had as she was before, and she would have gained only labor and expense for her trouble. And even if appellants admitted their guilt, but denied the value of the property as claimed by respondent, no relief would have been possible. So, in any event, a suit was inevitable. Respondent avoided a multiplicity of suits, as the law directs, by bringing this suit in the first instance.

Lastly, may the complaint be sustained as an action on the case on account of the conspiracy to defeat plaintiff's judgment? Were there no such action as the one we have been considering, undoubtedly an action on the case, or trespass, would lie. It cannot be gainsaid that for the wrong done respondent there is not an adequate remedy. Assuming, for the sake of argument, that a creditor's bill does not lie, we briefly consider the facts as alleged in the complaint and proved on the trial, as the record shows. Viewing the case, then, as in form an action on the case, or trespass, the gist of the action, we take it, would be the recovery of damages for the wrongful conduct of the appellants. Even then, we have an action in the nature of a bill in equity.

"The term 'action on the case' is usually understood to mean an action in form *ex delicto*. It is founded on the simple justice and conscience of plaintiff's right to recover, and is in the nature of a bill in equity." (6 Cyc., p. 684.)

"The action is an outgrowth of the principle that whenever the law gives a right or prohibits an injury, it will afford a remedy. Hence, where there has been an injury, for which

none of the established forms of action will lie, an action on the case may be maintained." (6 Cyc., pp. 686, 687; see, also, *Findlay v. McAllister*, 113 U. S. 104, 5 Sup. Ct. 401, 28 L. Ed. 930.) Whether the allegations of the complaint shall be held to constitute one form of action or another is a question of little importance, compared with the question whether or not respondent has a remedy for the wrong done her and the damages she has sustained. All forms of action are abolished in this state, and law and equity are administered in the same action.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

It is alleged in the complaint herein that on April 29, 1904, the plaintiff, in an action brought for that purpose against her husband, Pierre Raymond, in the district court of Lewis and Clark county, obtained a decree providing for the separate maintenance of herself and her four minor children, which the decree awarded to her custody; that the decree directed the husband to pay to her monthly, and on the first day of every month thereafter during the joint lives of plaintiff and defendant, or until reconciliation should be effected, or until the further order of the court, the sum of \$80; that it further directed that the defendant forthwith pay to her the sum of \$50 to purchase necessary clothing for the plaintiff and her children, and also an additional sum of \$48 to pay rent then due and owing by the plaintiff; that none of said sums have been paid by the defendant, or anyone in his behalf, but are long past due; and that the said defendant is wholly insolvent, has no other property within the jurisdiction of the court out of which the sums so awarded may be realized, and is, and has been since soon after the rendition of the decree, a nonresident of the state of Montana. It is then alleged as follows:

"(5) Plaintiff further avers: That no reconciliation has ever taken place between her and her said husband, Pierre Raymond, and there is no likelihood that any will ever occur between them. That ever since said decree of separate maintenance was en-

tered the said Pierre Raymond has utterly failed and neglected to contribute in any manner whatsoever to the support or maintenance of the plaintiff or her said minor children, nor has he communicated with them in any way, but has utterly abandoned this plaintiff and her said children.

“(6) That such proceedings were had in this court under and by virtue of said decree of separate maintenance; that the visible and known property of said Pierre Raymond, after he had departed without this state and had refused and failed to comply with said decree, was set apart by the court for the benefit of plaintiff and her said minor children in order to carry out and make effectual the provisions of said decree, but that the funds derived from the sale of said property of said Pierre Raymond have become almost exhausted, and will, in a very short period of time, be wholly consumed, thereby leaving plaintiff and her said minor children without any means of support, as this plaintiff is without any other property or means of her own.

“(7) Plaintiff avers that she brings this suit in behalf of herself and her said minor children to enable her to provide the means for her and their support and to secure to her and them the rights and benefits to which they are entitled under and by virtue of the aforesaid decree.

“(7a) Plaintiff further avers: That on or about March 10, 1904, at Lewis and Clark county, in the state of Montana, these defendants combined, connived, and conspired together to hinder, delay and defraud the plaintiff of her rights in the property of her said husband, and said defendants combined, connived, and conspired together to defeat the plaintiff in her said suit for separate maintenance against her husband, which was then pending in this court, as these defendants well knew, to make ineffectual any decree which she might obtain against her husband. And so it was that at the time and place aforesaid these defendants unlawfully and wrongfully took and carried away 150 head of sheep, of the particular kind known as wethers, then and there the property of the said Pierre Raymond and in

his possession, and which said wethers were of the value of \$900, and converted and disposed of the same to their own use to the damage of plaintiff in the sum of \$900.

“(8) That in the unlawful taking and converting of said 150 head of wethers, as aforesaid, the defendants have been guilty of fraud, oppression, and malice.”

The prayer demands judgment for the sum of \$900, with interest on this sum since March 10, 1904, and costs of suit, and that the amount, when recovered, be devoted by the court to the payment of the sums awarded plaintiff under the decree.

The defendants, in their answers, admit the rendition of the decree, as alleged, but put in issue all the other allegations of the complaint. At the commencement of the trial the defendants objected to the introduction of any evidence in support of the allegations of the complaint on the ground that they do not state a cause of action. The objection was overruled. At the close of plaintiff's case the defendants made separate motions for nonsuit, basing their motions upon the same ground upon which their objection was made. The motion of defendant Blaise was sustained, and the cause dismissed as to him. Those of the other defendants were denied. The latter declined to offer any evidence. The court submitted the case to the jury for two special findings, viz., whether the defendants converted the sheep, and what was their value at the time of the conversion. The jury having found that the defendants were guilty of the conversion, and that the sheep were of the value of \$712.50, judgment was rendered and entered in favor of plaintiff for this sum, with interest and costs. The defendants Blancgrass and Chevalier have appealed from the judgment and an order denying them a new trial.

The question submitted for decision is whether the complaint states facts sufficient to warrant any relief. It is not clear from an inspection of it whether it attempts to state a cause of action for a conversion, or one for damages in the nature of an action on the case for the wrongful conduct of defendants, by which plaintiff has been prevented from having satisfaction, *pro tanto*,

of her judgment, or whether the plaintiff has attempted to invoke the aid of equity to reach an asset of her husband which cannot be reached by the ordinary process of execution.

The form in which an action is brought is of no consequence; nor does it matter that the complaint contains allegations not appropriate to the purpose sought to be attained. In determining the issue of law presented by a general demurrer to the complaint, or by any other appropriate method of raising the question—as here, by an objection to the admission of evidence at the trial, on the ground that the facts stated do not warrant any relief—matters of form will be disregarded, as well as allegations that are irrelevant or redundant; and if, upon any view, the plaintiff is entitled to relief, the pleading will be sustained. (*Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49.)

We inquire, first, whether the complaint states a cause of action in conversion. In such an action the plaintiff must allege and prove a general or special ownership in the property and a right to the immediate possession of it at the time of the unlawful taking by defendant. (*Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413; *Glass v. Basin & Bay State Min. Co.*, 31 Mont. 21, 77 Pac. 302.) The allegations of the complaint here do not meet this requirement. It is nowhere alleged that the plaintiff was the owner of the sheep at the time of the conversion, nor that she had any special property in them, nor that she was in possession of them. Indeed, the contrary appears, for it is alleged that “these defendants unlawfully and wrongfully took and carried away 150 head of sheep * * * then and there the property of the said Pierre Raymond, and in his possession,” etc. The idea that plaintiff had any interest in them, even by possession, is thus excluded. Further, the conversion took place prior to the rendition of the decree, and it is not alleged that the cause of action arising out of it was set apart to the plaintiff under the terms of the decree, supposing this could have been effectively done.

Does it, then, state a cause of action for damages, upon the theory that, by the wrongful acts of the defendants, the plain-

tiff has been prevented, in part, from having satisfaction of her judgment against her husband? Just here it may be observed that the result of the action for separate maintenance was a personal judgment against Raymond which could be enforced by execution as any other judgment. "A judgment is the final determination of the rights of the parties in an action or proceeding." (Code Civ. Proc., sec. 1000.) While decrees in equity often extend to and cover matters entirely beyond the purview of judgments at law, they are nevertheless judgments within the definition of the statute, *supra*, and, so far as they award in any case a recovery of money, they are in nowise different from judgments at law. In legal effect there is no distinction. (5 Ency. of Pl. & Pr. 489.) When properly docketed they become liens upon the real estate of the debtor. They are enforced by execution just as are judgments in legal actions. (Code Civ. Proc., sec. 1214.) An order directing the payment of money is, *pro hac vice*, a judgment, and may be enforced by execution. (Code Civ. Proc., sec. 1825.) Even if the statute did not contain this specific provision, the court would adopt the most appropriate process. (Code Civ. Proc., sec. 205.) And it cannot be doubted that the execution would be most effective and appropriate.

The plaintiff, then, by the recovery of her judgment against her husband, became his creditor for the amount adjudged to be due her at the time of its entry, and also for the amounts accruing thereon from month to month, and occupied toward him the position of any other creditor. At least she "stands in the equity" of a creditor, and is entitled to the same relief in equity when she seeks to have her claim satisfied. (*Twell v. Twell*, 6 Mont. 19, 9 Pac. 537; *Bump on Fraudulent Conveyances*, 3d ed., 505; 14 Cyc. 298; 5 Ency. of Pl. & Pr. 439.) Such being the case, she is also entitled to maintain an action at law upon any ground which would be available to any other creditor.

The substantive statement in the complaint is that "said defendants combined, connived, and conspired together to defeat the plaintiff in her said suit, * * * which was then pending

in this court, as these defendants well knew, to make ineffectual any decree which she might obtain against her husband; and so it was that at the time and place aforesaid these defendants unlawfully, etc., * * * took and carried away, etc., * * * to the damage of plaintiff in the sum of \$900." There can be no doubt of the soundness of the proposition that a creditor who has been prevented by the wrongful acts of a third person acting in connection with or independently of the debtor from having satisfaction of his claim, may have his action for damages against such person, the measure of recovery being the value of the property put beyond the creditor's reach. This is sustained both by reason and authority. But when it is sought to apply it to particular cases, difficulty is encountered.

In Pennsylvania the action may be maintained by any creditor, whether he has a lien upon the property eligned or secreted or not, or whether he has reduced his claim to judgment. (*Penrod v. Mitchell*, 8 Serg. & R. (Pa.) 522; *Mott v. Danforth*, 6 Watts (Pa.), 304, 31 Am. Dec. 468; *Kelsey v. Murphy*, 26 Pa. 78.) In *Mott v. Danforth*, *supra*, the court seems to rely for support of its decision both upon cases adjudged at common law in England and upon the provisions of the statute of Elizabeth (13 Elizabeth, Chap. 5) relating to fraudulent conveyances and imposing penalties upon the guilty participants. But the rule of these cases is exceptional. Speaking generally, the courts of this country adhere to the rule that the action cannot be maintained unless the plaintiff, by judgment, execution, or attachment, has secured a lien upon the particular property, and thus has a vested right therein which has been rendered nugatory by the acts of the defendant, the plaintiff thereby having sustained a specific injury different from that suffered by other creditors. In other words, in order to warrant a recovery, the plaintiff must allege and show that he had a specific right to subject the particular property to the satisfaction of his judgment, and that the defendant, either alone or with others, has deprived him of this right. Otherwise a recovery would be had upon the plaintiff's bare chance to have satisfaction of a claim

which he possessed in common with other creditors—a wrong too remote, indefinite, and contingent to be the ground of an action. This is declared to be the rule by the supreme judicial court of Massachusetts in *Lamb v. Stone*, 11 Pick. (Mass.) 526, where it is said:

“The plaintiff complained of the fraud of the defendant in purchasing the property of his absconding debtor in order to aid and abet him in the fraudulent purpose of evading the payment of his debt. The court ask, What damage has the plaintiff sustained by the transfer of his debtor’s property? He has lost no lien, for he had none. No attachment has been defeated, for none had been made. He has not lost the custody of his debtor’s body, for he had not arrested him. He has not been prevented from attaching the property, or arresting the body of his debtor, for he had never procured any writ of attachment against him. He has lost no claim upon, or interest in, the property, for he never acquired either. The most that can be said is that he intended to attach the property, and the wrongful act of the defendant has prevented him from executing this intention. * * * On the whole, it does not appear that the tort of the defendant caused any damage to the plaintiff. But, even if so, yet it is too remote, indefinite, and contingent to be the ground of an action.” (See, also, *Wellington v. Small*, 3 Cush. (Mass.) 145, 50 Am. Dec. 719; *Bradley v. Fuller*, 118 Mass. 239.)

In the early case of *Smith v. Blake*, 1 Day, 258, the supreme court of Connecticut announced the same view and stated, as a further objection to the maintenance of such an action, that the result would be that the defendant would be subject to a like action by every one of the creditors of the insolvent debtor, and thus be liable to pay many times the value of the property, whereas the only penalty imposed upon him by law is that he shall reap no benefit by his fraudulent conduct. The doctrine of this case is reaffirmed by the same court in the case of *Hatstat v. Blakeslee*, 41 Conn. 301, where the case of *Smith v. Blake* is cited with approval.

In *Moody v. Burton*, 27 Me. 427, 46 Am. Dec. 612, the supreme judicial court of Maine had before it the question whether a judgment creditor, with execution returned unsatisfied, could maintain an action against a third person who had conspired with the judgment debtor to put his property beyond the reach of his creditors. It was held that the action could not be maintained, because the plaintiff did not show a right to, or interest in, the property superior to that of any other creditor, and hence that the injury was too remote to sustain a judgment; and further, because, since the creditor could show no specific interest in, or lien upon, the property, but only a bare chance to reach it, there was no standard by which the injury could be measured. The same conclusion was reached in *Klous v. Hennessey*, 13 R. I. 332, the court holding that the fundamental reason why the action could not be maintained is that the "damage, which is the gist of the action, is too remote, uncertain, and contingent, inasmuch as the creditor has not an assured right, but simply a chance of securing his claim by attachment or levy, which he may not succeed in improving."

In *Hall v. Eaton*, 25 Vt. 458, the right to maintain the action was denied, the court basing its decision upon *Lamb v. Stone* and *Moody v. Burton*, *supra*.

The decisions of the New York court of appeals are conflicting. In *Braem v. Merchants' Bank*, 127 N. Y. 508, 28 N. E. 597, the right to maintain the action is denied, the court apparently distinguishing that case upon its facts from the earlier case of *Quinby v. Strauss*, 90 N. Y. 664, wherein it was held that the action would lie in favor of a judgment creditor. The two cases seem, on principle, to be directly in conflict.

In *Adler v. Fenton*, 24 How. (U. S.) 407, 16 L. Ed. 696, the supreme court of the United States refused to sustain an action by a general creditor against the fraudulent grantees of the debtor, repudiating the doctrine of the Pennsylvania cases. In the case of *Findley v. McAllister*, 113 U. S. 104, 5 Sup. Ct. 401, 28 L. Ed. 930, the general rule that in order to sustain the action the plaintiff must show a specific interest in the fund or prop-

erty sought to be applied to the satisfaction of his judgment was recognized, the court citing and distinguishing *Adler v. Fenton*, *supra*. The same rule has been recognized by the supreme court of Wisconsin. (*Field v. Siegel*, 99 Wis. 605, 75 N. W. 397.) A collection of cases may be found in the notes to this case, reported in 47 L. R. A. 433.

It thus appears that under the rule established by the great weight of authority in this country, although it is made clearly to appear that the defendant has willfully become a party to a conspiracy to defeat the judgment of the creditor, such a creditor has no cause of action against him, unless he can show that he has suffered some special injury different from that suffered by the other creditors.

Applying the rule announced in the cases cited to the allegations of the complaint, we find that they are not sufficient to sustain the action, in that it does not appear therefrom, even by inference, that the plaintiff had any special right in the property alleged to have been fraudulently taken from the possession of her husband by the defendants. At the time the conversion occurred the suit was pending. She had no judgment, and therefore, at that time, was not a creditor of her husband, for the relation of creditor was fixed by the entry of the decree in the separate maintenance action. Prior to that time her husband was not her debtor, and in this respect she occupied a different relation toward him from that of any other creditor.

Counsel for respondent contends, however, that the complaint is in form and substance a creditor's bill, and in support of this contention among other cases cites *Twell v. Twell*, 6 Mont. 19, 9 Pac. 537, *Ryan v. Spieth*, 18 Mont. 45, 44 Pac. 403, and *Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46. But none of these cases are in point, nor are any of the others cited. It does not appear that Raymond, the debtor, had anything to do with the conversion of the sheep by the defendants, so that he might be said to have fraudulently disposed of or concealed them, and the purpose of the action is to annul the fraudulent conveyance

which stands as an obstruction in the way of plaintiff's execution. The complaint has none of the attributes of a bill to reach property fraudulently conveyed. If it were otherwise sufficient for this purpose, it would fail, for the reason that it does not show that the plaintiff has acquired a lien on the property by attachment or execution, or that there is a trust therein in her favor. (*Wilson v. Harris, supra*; *Westheimer v. Goodkind*, 24 Mont. 90, 60 Pac. 813; *Wyman v. Jensen*, 26 Mont. 227, 67 Pac. 114.) Nor has it any of the attributes of a bill of discovery, for that it appears expressly upon the face of it that the relations between the parties and their attitude toward the subject matter of the controversy are clearly understood and no discovery is necessary. In fact, the manifest purpose of the action is to secure a judgment in favor of the plaintiff upon a cause of action for a conversion by the defendants existing in favor of her husband, the sole ground of her right to do so being that she is a creditor.

Without pausing to discuss the features of that character of a creditor's bill, the purpose of which is to reach assets not liable to execution, it may be remarked that a creditor cannot, solely on the ground that he is a creditor, and that his debtor has no property other than an existing cause of action at law, bring suit upon such cause of action and obtain a judgment thereon as if he were the owner of it, and justify the action on the theory that he is proceeding by a creditor's bill. To hold the contrary would be equivalent to laying down the doctrine that, because an insolvent debtor does not bring action to rectify a wrong done him, his creditor may do so, and not only so, but may, in his own right, bring the wrongdoer to book by going into a forum and adopting a form of action wherein and whereby the wrongdoer is deprived of a trial according to the fundamental law requiring his case to be submitted to a jury according to the forms of law.

Now, it is insisted by counsel for respondent and conceded by counsel for appellant, that the legal cause of action existing in favor of Raymond which the plaintiff seeks to reach is prop-

erty which may be subjected to the satisfaction, *pro tanto*, of plaintiff's judgment. If this is so, and there is every reason why it should be so under the statute (Civ. Code, sec. 4662), plaintiff had a plain, speedy, and adequate remedy at law, and therefore could not call equity to her aid until she had exhausted it.

The statutes of Montana relating to the kinds of property that may be taken on execution are very broad, and under them any species of property may be seized, sold, and the proceeds thereof applied to the satisfaction of the judgment. The procedure which would have given plaintiff all the relief to which she was entitled is found in the following sections of the Code of Civil Procedure:

"Sec. 1218. All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution. Shares and interests in any corporation, or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachment. Gold-dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution."

"Sec. 1224. The sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient, collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs, must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff, he must levy only on such part

of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs."

"Sec. 1232. When the purchaser of any *real* property not capable of manual delivery pays the purchase money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied."

Under section 1218 all property of every description, tangible and intangible, including debts, credits, and all other property not capable of manual delivery, may be attached on execution in like manner as upon writs of attachment. By reference to section 895 of the Code of Civil Procedure, as amended by the Act of 1899 (Laws 1899, p. 139), debts, credits, and other personal property not capable of manual delivery are attached by serving upon the debtor, or person responsible, a copy of the writ and the notice therein directed. Under section 1224, *supra*, the sheriff must collect or sell the things in action, and also sell the other property seized, until sufficient funds are realized to pay the judgment. It will be noticed that in section 1232, *supra*, which contains directions to the sheriff as to the delivery of a certificate in case of a sale of property not capable of manual delivery, the word "real" qualifies the term "property."

When we examine all the provisions of the chapter together, it becomes apparent that the use of this term is a mistake, and that the term "personal" must be substituted for it. Section 1233 and the following sections direct the sheriff relative to sales of real estate and provide for redemption. If the word "real" be retained in section 1232, this section becomes inconsistent with the following sections, or else can be assigned no intelligent meaning. Real estate is never capable of manual delivery. If, however, the position of this section in the chapter be considered, and it be held to apply to the subject with which it evidently deals, it is clear that the substitution should be made, for thus all the sections are made consistent, and we have

a provision which prescribes what shall be done in case of sales of personal property not capable of manual delivery, whereas, otherwise, we should find no such provision. Besides, section 698 of the Code of Civil Procedure of California, pertaining to the same subject, of which our section is a literal copy, except in the particular just mentioned, uses the word "personal," giving the section the meaning and application which the legislature of that state, and of our own state as well, evidently intended it to have. Making the proper substitution in this section, and considering all the sections together, it is entirely clear that the plaintiff could have reached the asset of her husband sought to be reached in this action by the process of execution, and hence that the necessity to go into a court of equity to obtain aid did not exist. For, according to the contention of her counsel, the very purpose of her action was to reach an asset that she could not reach by this process. Nor is it any hardship upon plaintiff that she is compelled to pursue the remedy thus pointed out. This course is required of every creditor, and equity will aid only when an adequate remedy is not found in the provisions of law. The want of an adequate remedy at law "constitutes the very cradle of equity." (*Wilson v. Harris, supra.*)

The remedy pointed out is adequate. The execution could have been levied as easily as a service of summons could have been made in this case. If no other purchaser could have been found, the plaintiff could have become the purchaser herself, and thus have become vested with title to the cause of action, whereupon, if defendants had refused payment without suit, she could with legal propriety have sued in her own name. It is no answer to this reasoning to say that this course would have been somewhat less expeditious than the one pursued by the plaintiff. If the asset must be regarded as property to be subjected to the payment of debts, it must follow as a necessary conclusion that the way pointed out by the statute to reach it must be pursued.

Since the complaint does not state a cause of action from any point of view, the judgment and order must be reversed, and it is so ordered.

Reversed

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

McINTOSH, RESPONDENT, v. JONES, APPELLANT.

(No. 2,480.)

(Submitted January 17, 1908. Decided February 1, 1908.)

[93 Pac. 557.]

Master and Servant—Personal Injuries—Duty of Master—Selection of Fellow-servants—Appeal—Briefs—Rules.

Appeal—Briefs—Rules.

1. A brief which substantially complies with Rule X of this court, with relation to its contents, is sufficient.

Master and Servant—Personal Injuries—Negligence of Fellow-servants—Master's Liability.

2. In the absence of a statute to the contrary, a master is not liable to one servant for injury caused by the negligence of another servant in the same common employment, unless the negligent servant was the master's representative, or the master was negligent in employing or retaining him.

Same—Single Act of Negligence—Liability of Master.

3. A servant's single act of negligence, committed after the hiring and without the master's knowledge, is not sufficient to charge the latter with lack of ordinary care in selecting the former as his employee.

Same.

4. The single, exceptional act of a servant in releasing his hold on a piano while helping to move it, when he should not have done so, did not prove him to be incompetent for that class of work.

Same—Selection of Fellow-servants—Duty of Master.

5. Upon a transfer company rested the duty of exercising ordinary care in the selection of a helper to assist one of its employees in moving a piano.

Same.

6. An employee of a transfer company was not entitled to recover damages from his employer for injuries alleged to have been sustained by reason of defendant's failure to exercise ordinary care in

selecting a reasonably competent fellow-servant to assist plaintiff in moving a piano, where it appeared that all that was required of the helper was strength and ordinary intelligence, which he possessed, and that plaintiff was injured by the assistant releasing his hold on the piano contrary to plaintiff's orders.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Edgar McIntosh against John O. Jones and another, partners, under the firm name of the Jones Transfer Company. From a judgment for plaintiff against defendant John O. Jones, and an order denying a new trial, defendant John O. Jones appeals. Reversed, and new trial ordered.

Mr. John J. McHatton, for Appellant.

The work to be performed by plaintiff and his assistant required no special skill or ability, and plaintiff's own testimony showed that his assistant did everything that an ordinarily prudent man could have done. The mere occurrence of the accident did not make defendant liable. (12 Ency. of Law, 1021 P. C.; *Hatheway v. Illinois Cent. R. Co.*, 92 Iowa, 340, 60 N. W. 651; *Curran v. Merchants' Mfg. Co.*, 130 Mass. 374, 39 Am. Rep. 457; *Lee v. Detroit Bridge Co.*, 62 Mo. 565; *Cooper v. Milwaukee etc. R. Co.*, 23 Wis. 668; *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267, 38 Pac. 596; *Wright v. New York Cent. Ry. Co.*, 25 N. Y. 562; *Murphy v. St. Louis etc. Ry. Co.*, 71 Mo. 202.) Defendant was not a guarantor, nor was he responsible as an insurer. (Labatt on Master and Servant, 188, 189, 397, 398; *Gier v. Los Angeles etc. Ry. Co.*, 108 Cal. 129, 41 Pac. 22; *Matthews v. Bull* (Cal.), 47 Pac. 773; *Stevens v. San Francisco & N. P. R. R. Co.*, 100 Cal. 554, 35 Pac. 165; *Thomas v. Herrall*, 18 Or. 546, 23 Pac. 497.) There is, in the absence of express contract, absolutely no responsibility upon the part of an employer and there is no presumption that a fellow-servant is incompetent or careless. (*Beasley v. San Jose Fruit Packing Co.*, 92 Cal. 388, 28 Pac. 485; *Hermann v. Port Blakely Mill Co.*, 71 Fed. 853, 856; *Tyler v. Last Chance Min. Co.*, 71 Fed. 856.)

The injury must result from incompetency, and not from negligence. (*Central R. R. Co. v. Keegan*, 82 Fed. 174, 27 C. A. 105.) The rule is well settled that a single act of negligence is not enough. (*Baulec v. New York etc. R. R. Co.*, 59 N. Y. 356-363, 17 Am. Rep. 325; *Holland v. St. Paul Ry. Co.*, 100 Cal. 240, 34 Pac. 666; *Stevens v. San Francisco Ry. Co.*, 100 Cal. 567, 35 Pac. 165; *Hermann v. Port Blakely Mill Co.*, 71 Fed. 856; *Kindel v. Hall*, 8 Colo. App. 63, 44 Pac. 781; *Cosgrove v. Putnam*, 103 Cal. 268, 37 Pac. 232; *Gier v. Los Angeles etc. Ry. Co.*, 108 Cal. 134, 41 Pac. 22.) The negligence resulting in the accident was that of plaintiff and his coemployee, for which he cannot hold defendant responsible. (*Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515; *The Elton*, 142 Fed. 372; *Curran v. Merchants' Mfg. Co.*, 130 Mass. 374, 39 Am. Rep. 457; *Gier v. Los Angeles Co.*, 103 Cal. 129, 41 Pac. 22.)

Messrs. Maury, Templeman & Hogevoell, for Respondent.

Where the work in which the servant is to be employed is such as to endanger the lives and persons of coemployees, the master, before engaging such servant, is required to make reasonable investigation into his fitness and skill. (*Indiana Mfg. Co. v. Millican*, 87 Ind. 87; *Western Stone Co. v. Whalen*, 151 Ill. 472, 42 Am. St. Rep. 244, 38 N. E. 241; *Mann v. Delaware & H. Canal Co.*, 91 N. Y. 495; *Norfolk & W. R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342; *Alabama & F. R. Co. v. Waller*, 48 Ala. 459; *The Anaces*, 93 Fed. 240, 34 C. C. A. 558; *Nutzmann v. Germania Life Ins. Co.*, 78 Minn. 504, 81 N. W. 518; *Fraser v. Schroeder*, 163 Ill. 459, 45 N. E. 288; *Postal Tel. Cable Co. v. Coote* (Tex. Cr. App.), 57 S. W. 412; *International & G. N. R. Co. v. Martinez* (Tex. Cr. App.), 57 S. W. 689; *Fines v. Woolfolk*, 73 Hun, 549, 26 N. Y. Supp. 181.)

MR. JUSTICE SMITH delivered the opinion of the court.

The above-entitled action was instituted in the district court of Silver Bow county to recover damages for personal injuries

received by plaintiff through the negligence of a fellow-servant.

Plaintiff and his fellow-servant were engaged in moving a piano. Plaintiff, in his complaint, alleges: "That the defendant sent the said man and employed him to assist the plaintiff, either knowing him to be lacking in all skill in and about the said business, or negligently failed to find out whether the said man had any skill in and about the said business or not. That, while moving said piano * * * the plaintiff and said man * * * working together, the said man negligently let go the piano when the plaintiff was under the same, and when the said man, if he had been [a] a skillful man at this business, could have held the said piano off of the said plaintiff, and by and through the negligence of said man * * * in thus letting go negligently of the said piano, and through the negligence of the said defendants in either knowing the said man to have no skill at the work, or in negligently failing to find out if he had any skill or did not have any skill, the piano fell upon the plaintiff," and injured him. It is further alleged: "That, until the said man * * * negligently let go of the piano * * * plaintiff did not know that he was lacking in skill and believed him to be in all respects a skillful and experienced man at the trade of moving pianos, * * * for which the defendants had employed him to work, and the plaintiff relied, when going to work with said man, upon the defendants that they would and did furnish him with a good and skillful and experienced fellow-servant in and about the said work."

For answer defendants first denied each and every allegation of the complaint, and thereafter set forth certain affirmative matters, not necessary to be considered in deciding the case, except to this extent: 1. The answer contains an allegation "that, while the plaintiff and said man were attempting to move the piano, they did, through their own fault and lack of skill and attention, allow the same to fall upon the plaintiff." 2. It is therein set forth that plaintiff was injured "through his own lack of care in handling the piano, and that he knew all of the

facts and circumstances surrounding the attempt to remove the same and the capacity of said man who was assisting him, and that he voluntarily assumed all risk of injury which might result therefrom, and that he himself contributed to his own injury, in that it was, in part, through his own fault that said piano was allowed to slip and fall upon his leg; that the said man who was assisting plaintiff in moving the piano was negligent therein, and that he was a fellow-servant with the plaintiff, and that his negligence, together with that of the plaintiff, combined to bring about said accident and injury, and that plaintiff assumed all danger and risk of injury by reason of the employment of said man, or any negligence or lack of care upon his part."

The replication admits that the man who was assisting plaintiff in moving the piano was negligent therein, and was a fellow-servant of plaintiff, but denies every other allegation of the answer. The trial resulted in a verdict in favor of plaintiff and against defendant J. O. Jones for \$3,025, and from a judgment entered thereon and an order denying a motion for a new trial that defendant appeals. Many errors are assigned, but it will not be necessary to notice all of the specifications.

Plaintiff testified as follows, in part: "I worked for Jones for about two years prior to my injury, doing all kinds of transfer work, moving furniture, machinery, pianos, and so forth. Men ought to be experienced to move heavy freight and pianos, and should understand their business in order to be successful and not get hurt. * * * It takes experience and a long time for an ordinary man to become ordinarily skillful at that trade. * * * On the fourteenth day of June, 1905, in the morning, I was instructed to go down and unload a carload of furniture. Mr. Jones told me in the morning to employ another man, and go down there and unload this carload of furniture. So I did so. We worked the forenoon, and at noon Mr. Jones came to me and said: 'Mack, I want to take that man away from you that worked with you in the forenoon,' and he says: 'I will get you another man,' * * * and we went down after dinner, and

we had a load of furniture in the car, such as chairs. This new man that Mr. Jones got me and I went down; so we went down there and had this small load and unloaded it and came back to the city; and before we struck the stand Mr. Jones and his son, who stood on the sidewalk, * * * said to me: 'There is a piano at the Munroe School'; said for me to take this man and move the piano because they were overstocked with work that day, so I did so, according to instructions. We went to the place where the piano was, and * * * put the piano on this truck and rolled the piano to the brim of the stairs, and, of course, I went ahead of the piano and this here fellow, I told him to take the hind end of the piano, and, when I got ready, I said, 'Break the piano over, and be very careful, as we are in a dangerous place,' and he broke it over. While we two were moving the piano, this man acted all right so far as I could see. When we started the piano down the steps, he just merely let go of it, and I was ahead of it, and I couldn't hold it as she broke over. * * * It never landed on the stairs, and shot right ahead. If he had had hold of it until it got over the stairs, we would have had a purchase on it and could have held it. * * * A man of experience in the position in which the other man was as the piano was going over the top step would have had hold of the handles and held back for all his might. By so doing he would have checked the speed, and he and I could both have held the piano and taken it down safely. * * * I judge the piano weighed somewhere in the neighborhood of eight hundred pounds. * * * When the piano came forward, my limb got underneath the piano truck, and the piano slid down the steps on my limb, and tore my foot off, and bruised my leg and broke some bones. My leg was taken off there, about four or five inches below the knee." On cross-examination he testified: "I started myself and went down the street to see if I could locate a man. I could not locate one suitable for me, so I came back and told Mr. Jones I couldn't get a man. * * * Then Mr. Jones went out for five or ten minutes, and he brought back a man about the same height as myself, fair, and a strong,

robust-looking fellow, who weighed one hundred and seventy pounds, I should judge. He was a stout-looking man. From outward appearances, he seemed to be a capable man, and he was sober, and I thought he was all right, judging from his appearance. While he was helping me to move this load of furniture, he was all right; didn't show any lack of intelligence for work of that kind. I had moved pianos before, quite a number of them. * * * I did not make any objection to moving this piano with this man. I was relying on Mr. Jones. I was satisfied when I started out with him that he was all right and reliable for the doing of that work. * * * Up to the time he let go of the piano, he acted as a man of intelligence, and had done everything in a proper way toward moving the piano, as far as I could judge. Prior to the time we began the operation of the piano, and during the time we were putting the piano on the truck, I told him that that was a dangerous operation—the moving of the piano—as we came downstairs, and I had warned him to be careful, and up to that time he had acted as though he was endeavoring to comply with my request."

Respondent's counsel suggest that appellant has not complied with Rule X of this court, in that his brief does not state where in the transcript the judgment can be found, and does not state the questions involved on the appeal, as directed by the rule. We find on page 6 of the brief the statement that the judgment may be found at page 23 of the transcript, and a copy of the judgment is there set forth. We think the statement of the case presents the questions involved substantially in compliance with the rule.

At the close of plaintiff's case the defendants moved for a nonsuit, on the grounds, among others, first, that the complaint does not state facts sufficient to constitute a cause of action; second, that there was no evidence that the man who assisted plaintiff was an incompetent or unskillful man to engage in such work, and, if he was incompetent, the plaintiff either knew it or had reason to know it, and assumed the risk;

third, that the evidence fails to show that the man engaged with plaintiff was unskillful, unfit, or incompetent for the work in which he was engaged, and fails to show that the defendants were lacking in the exercise of ordinary care in the selection and employment of said man; and, fourth, that, if plaintiff was injured through the act of the other man, it was a single act of negligence, and did not establish incompetence or lack of skill. This motion was overruled as to the appellant J. O. Jones. We think the motion should have been granted as to him, and our reasons may be stated generally, without taking up, in detail, the different grounds of the motion.

It is a settled rule of law, where not changed by statute, that a master is not bound to indemnify one servant for injuries caused by the negligence of another servant in the same common employment as himself, unless the negligent servant was the master's representative. (2 Labatt on Master and Servant, sec. 470.) While the reason for and origin of the foregoing rule are matters of dispute among courts and law-writers, the rule itself is not doubted. But the doctrine that a servant cannot maintain an action for injuries caused by the negligence of a coservant has always been conceded to be subject to an exception in cases where negligence on the master's part in employing or retaining in his employ the delinquent coservant is shown. (2 Labatt on Master and Servant, sec. 480.) Judge Bailey, in his work entitled "Master's Liability for Injuries to Servant" (page 47), states the exception to the rule thus: "The master must exercise due and reasonable care in the selection of his servants, with reference to their fitness and competency"; and on page 55: "The presumption is that the master has exercised proper care in the selection of the servant. It is incumbent upon the party charging negligence in this respect to show it by proper evidence."

In the case at bar the plaintiff raises no question as to the relations existing between him and his helper. It is admitted that they were fellow-servants engaged in a common employment. The allegation which we shall consider is, that defend-

ants did not exercise ordinary care in selecting a reasonably competent man to assist the plaintiff. It is true that the defendants alleged in their answer that, "while the plaintiff and said man were attempting to move said piano, they did, through their own fault and *lack of skill* and attention, allow the same to fall upon and crush the plaintiff's ankle and foot." But the phrase "lack of skill," used in this connection, must be construed to refer to the act of negligence testified to by the plaintiff, and it was evidently so treated at the trial.

The first question to be decided is: What measure of care was required of the defendants in the selection of a man to assist in moving a piano? And in this connection it may be remarked that, if any particular degree of skill is required in moving a piano, that skill, in this case, was furnished by the plaintiff himself. He was the expert in the business, if we may be allowed that expression. He knew how to move pianos; had been engaged for two years in the work, and undertook to instruct the new man as to what was required of him. Those instructions were simple. The assistant was to take the hind end of the piano and be very careful. If these instructions had been followed, the helper would have taken hold of the handles, and held back "with all his might." Plaintiff testified that it requires some skill to move a piano and some experience to acquire that skill. Concede that. Plaintiff himself supplied the skill and experience. All that was required of the helper was strength. That he apparently possessed. McIntosh says he was a strong, robust, and stout-looking fellow, weighing about one hundred and seventy pounds, apparently sober and intelligent. The duty rested upon defendants to exercise ordinary care in the selection of the helper, in view of the nature of the work to be performed. The work required of the assistant was of an ordinary character, not essentially different from any other heavy laborer's work. It was not "hazardous," as distinguished from "ordinary." A physical inspection of the man was all that was necessary to show his competency, unless he was mentally deficient; and McIntosh says he was not. Indeed, the

plaintiff does not claim, in his testimony, that the helper was incompetent. These are his words: "While we two were moving the piano, this man acted all right so far as I could see. When we started the piano down the steps, he just merely let go of it." No inquiry on the part of Jones would have disclosed the fact that the man would neglect to obey McIntosh's orders. A single, exceptional act, like this, will not prove a servant incompetent.

It may be permissible to prove a single act of negligence as bearing upon the question of incompetency of the servant, or, at least, as bearing upon defendant's knowledge of the employee's conduct. The courts differ on this question, and we have no occasion to decide it here. But a single act of negligence, committed after the hiring and without the knowledge of the master, cannot possibly charge the master with lack of ordinary care in selecting the servant. Perhaps this case illustrates the principle of the master's nonliability for the negligent act of a fellow-servant as aptly as any case could. It involves just such an act of negligence, on the part of a co-servant, as the master is not liable for, provided he has exercised ordinary care in the selection of the coservant.

In the case of *Harvey v. New York C. & H. R. R. Co.*, 88 N. Y. 481, the court said: "He [the negligent employee] was a man of but fifty-six years of age, and there is no suggestion that he was not possessed of ordinary intelligence. The duties of a switchman are not complicated or difficult, and there can be no doubt that on the day in question he was entirely competent to perform the duties imposed upon him. It appears from his own evidence that his failure to close the switch on the day in question did not arise from any inability on his part to perform the work he was set to do, but that such failure was the result of sheer inattention and carelessness on his part." And it was held that his employer was not liable for his failure to close a switch, resulting in the death of a fellow-servant.

This language is employed by the supreme court of New York, in the case of *Burke v. Syracuse, B. & N. Y. R. R. Co.*, 69 Hun,

21, 25, 23 N. Y. Supp. 458, 460: "Upon the occasion of the injuries no duty rested upon Clark [a crossing tender] to open the switch. His act in raising the ball and breaking the main track was voluntary, thoughtless, and mistaken. Nothing appears in the case showing that he had not physical power to perform all the acts and duties required of him at the station, or that he was not mentally fit for the position assigned to him by the defendant. * * * The observations made by the learned counsel for the respondent seem appropriate and pertinent where he says: 'The defendant could not make a psychological examination of Clark, or delve into the secret recesses of his brain to ascertain whether, at some future period, he would for an instant become the prey of a delusion and work destruction. It was no more bound to anticipate this unnatural occurrence than it would have been the act of Clark, had he in a moment of temporary aberration drawn a pistol and killed the plaintiff's intestate.'" (See, also, *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338; *Huffman v. Chicago, R. I. & P. Ry. Co.*, 78 Mo. 50; *Couch v. Watson Coal Co.*, 46 Iowa, 17; and also *Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807; *Frazier v. Pennsylvania R. R. Co.*, 38 Pa. St. 104, 80 Am. Dec. 467.)

There is no evidence in this case which warranted the jury in finding that any act of neglect on the part of the appellant contributed in any manner to produce the injury to plaintiff.

The judgment and order appealed from should be reversed and a new trial ordered.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

**HARRINGTON, APPELLANT, v. BUTTE, ANACONDA AND
PACIFIC RY. CO., RESPONDENT.**

(No. 2,485.)

(Submitted February 4, 1908. Decided February 10, 1908.)

[93 Pac. 640.]

*Personal Injuries—Appeal—New Trial—Instructions—Review
—Verdict—Arrived at by Chance—District Courts.*

New Trial—When Order Granting Affirmed.

1. If a party was entitled to a new trial upon any one of a number of grounds urged by him on motion for a new trial, the order granting it will be affirmed, though based upon a ground devoid of merit.

Instructions—Review.

2. In reviewing a charge to the jury the supreme court will examine it as a whole, and if then the instructions fully and fairly submit the case, the judgment will not be reversed on the ground that some of them, standing alone, are inaccurate or even prejudicially erroneous, if these latter are qualified and explained by other portions of the charge *in pari materia*.

Personal Injuries—Verdict—Chance—Duty of District Court.

3. In an action for damages for personal injuries, the jury returned a verdict for \$18,750. Upon polling of the jury the court inquired if the verdict had been reached by chance. Several of the jurors' answer was in the affirmative. The court thereupon directed them to again retire and find a verdict by "deliberation and reasoning thereon," excluding the element of chance. A verdict for \$20,000 was then returned shortly afterward. *Held*, that the action of the court was unauthorized; that the verdict first returned should have been received, and that it could only be set aside upon application of the party aggrieved, under section 1171 of the Code of Civil Procedure, providing for a new trial on the ground that the jury had resorted to chance in arriving at their verdict.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Bernard Harrington, through Jeremiah P. Harrington, his guardian *ad litem*, against the Butte, Anaconda and Pacific Railway Company. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Mr. John J. McHatton, Mr. Peter Breen, and Mr. Jesse B. Roote, for Appellant.

The court, in the exercise of its inherent power, performed its simple duty by refusing to accept a chance verdict, and re-

quiring the jury to agree upon a verdict. The statute, section 1090 of Code of Civil Procedure, provides for the supervision of the court over the verdict. (See, also, *People v. Jenkins*, 56 Cal. 4; *People v. Dick*, 34 Cal. 663; *People v. Perry*, 65 Cal. 568, 4 Pac. 572.) In a case where two defendants were sued for joint tort, and the jury returned a verdict against one of them, it was held that it was no verdict. (*Rankin v. Central Pac. R. Co.*, 73 Cal. 93, 15 Pac. 57.) The Court has the authority to direct the jury to return a proper verdict. (*Johnson v. Rider*, 84 Iowa, 50, 50 N. W. 36; *Nickelson v. Smith*, 15 Or. 200, 14 Pac. 40; *Warner v. New York Cent. Ry. Co.*, 52 N. Y. 437, 11 Am. Rep. 724; *Dalrymple v. Williams*, 63 N. Y. 361, 20 Am. Rep. 544; *Bishop v. Mugler*, 33 Kan. 145, 5 Pac. 756; *Loudy v. Clark*, 45 Minn. 477, 48 N. W. 25; *Crane Lum. Co. v. Auto Creek Lum. Co.*, 79 Mich. 307, 44 N. W. 788; *Sutliff v. Gilbert*, 8 Ohio, 405; *Smith v. First Nat. Bank*, 45 Neb. 444, 63 N. W. 796; *Smith v. Lynch*, 7 Colo. 383, 43 Pac. 670; *Hatch v. Atrell*, 118 N. Y. 383, 23 N. E. 549; *Rogan v. Mullins*, 47 N. Y. Supp. 920, 22 App. Div. 117; *Newell v. Wilgus* (Pa.), 11 Atl. 365; *Browning v. Dean*, 123 Mass. 254; *Mason v. Massa*, 122 Mass. 477.)

Messrs. Forbis & Evans, and *Mr. D. Gay Stivers*, for Respondent.

We contend that after a verdict had been reached and returned by the jury into court, no legitimate inquiry could be made as to it, except in the manner prescribed by statute; that the verdict so returned became the verdict of the jury and that the court could do nothing but accept it; that it was beyond the power of the court to reject it, or inquire as to it, except as the law directs; that the subsequent verdict of the jury is ineffectual and certainly so as against a direct attack, and that it must be set aside and a new trial directed. (*Ray v. Goings*, 112 Ill. 656; *Bassham v. State*, 38 Tex. 622; *McConnell v. Linton*, 4 Watts (Pa.), 357; *Clough v. State*, 7 Neb. 323, 342.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The plaintiff, an infant, brought this action by his guardian *ad litem* to recover damages for a personal injury alleged to have been occasioned by the negligence of the defendant through its servants and employees, in running its cars at a point upon its line of road where it crosses a highway called "North Wyoming Street," immediately north of the city of Butte.

The defendant is the owner of a line of road running from Anaconda to Butte, with the usual necessary sidetracks, switches, spurs, etc. At the point where the accident occurred there are two tracks on a grade ascending from the east to the west. It seems that in switching cars from the north to the south track, they are pushed up the grade toward the west over the north track, and, being uncoupled from the engine, which then moves away toward the east, are allowed to drift back by their own weight over upon the south track, one or more brakemen being in charge to check the momentum. Wyoming street is used extensively by the people living in the vicinity of the crossing.

On July 5, 1906, the day of the accident, a number of people, among whom were several children, including the plaintiff, had gathered near the crossing, being drawn together by the peculiar appearance and behavior of a man who was singing and acting as if intoxicated. It is alleged that by reason of the negligence of the defendant in failing to have a watchman at the crossing to warn passengers over the highway or persons present of the danger, and the reckless and careless management of defendant's employees in the switching of cars, the plaintiff was knocked down and run over by one of defendant's cars, whereby he suffered the loss of his left arm and other injuries, thus being permanently disabled and disfigured in his person.

The issue made by the pleadings and submitted to the jury was whether the injury was the result of negligence of defendant's employees, or of the act of plaintiff himself by suddenly coming upon the track in front of the moving car, and thus

rendering it impossible for defendant's employees to avoid the injury. The trial resulted in a verdict for the plaintiff for \$20,000, and judgment was entered accordingly. The defendant moved for a new trial on several of the statutory grounds, including alleged errors in the instructions and irregularity in the proceedings of the court, by which the defendant was prevented from having a fair trial. The motion was sustained, on the ground of error in one of the instructions which the court deemed prejudicial; the presiding judge stating in the order that "other errors, if such, could be avoided at the new trial." The plaintiff has appealed.

While it is contended by counsel for the appellant that there is no error in any of the instructions, it is conceded that, though the court was mistaken in granting the order on the ground it did, yet if the order should have been granted upon any of the grounds urged, it should be affirmed. The concession is properly made, because, if the defendant was entitled to a new trial upon any of the grounds urged, the order was properly made, though it was based upon a ground that was devoid of merit.

We shall not comment upon the particular instructions of which complaint is made, further than to say that, while some of them are open to criticism, in that they are inaccurate and somewhat vague in expression, yet, when read in connection with others on the same subject, the complaint made of them appears to be without substantial merit. It is a familiar rule that, in reviewing a charge of a trial court, it will be examined as a whole. While one or more paragraphs, standing alone, may be inaccurate or even prejudicially erroneous, yet, if these are qualified and explained by the other portions of the charge *in pari materia*, and, taken together with them and the rest of the charge, fully and fairly submit the case to the jury, the verdict and judgment should be sustained. (*Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728; *Cushing v. Quigley*, 11 Mont. 577, 29 Pac. 337; *Cannon v. Lewis*, 18 Mont. 402, 45 Pac. 572; *State v. Fuller*, 34 Mont. 12, 85 Pac. 369, 8 L. R. A., n. s., 762.) While, as stated, some paragraphs of the instructions are not

sufficiently explicit and comprehensive, we do not think any error therein sufficient to warrant the granting of a new trial.

We are nevertheless of the opinion that a new trial should have been granted on the ground of irregularity in the proceedings of the court. When the jury came in with their verdict, the following proceedings were had: The foreman handed a written verdict to the judge, who, having examined it, handed it to the clerk. The clerk then marked it filed, signing his name to the filing mark. He thereupon read it aloud to the court and jury, as follows: "We, the jury in the above-entitled action, find our verdict in favor of the plaintiff, and against the defendant, for the sum of \$18,750. Michael Hennigan, Foreman." Inquiry was made of the jury whether this was their verdict. The inquiry was answered in the affirmative by the foreman. The jury being polled, each juror answered that the verdict was his. Immediately thereafter the court inquired of the jury by what method they had reached the verdict, stating that a quotient, or chance, verdict was void, and defining what is meant by the expressions "quotient" and "chance." Several of the jurors stated that they had arrived at the amount of damages found by having each one write down the amount he thought plaintiff entitled to and dividing the sum by 12. Thereupon the court directed the jury to retire and find a verdict by "deliberation and reasoning thereon," and, if they found for plaintiff, to find as their best judgment dictated upon the evidence and instructions, excluding the element of chance. The clerk then handed to the foreman the verdict already announced, whereupon the jury retired to their room. Presently the jury again returned into court, presenting to the court the same written verdict, except that the amount, \$18,750, had been erased and \$20,000 written in place of it. Thereupon the jury were discharged. At none of these proceedings were the parties or their counsel present.

We are of the opinion that the action of the court was wholly unauthorized, in that it was in total disregard of the provisions of the statute applicable. Section 1090 of the Code of Civil

Procedure declares: "When the verdict is announced, if it is informal or insufficient in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out." After the verdict has been announced, it has passed from the control of the jury, except for the purposes declared by the statute. The purposes for which it may be retained are clearly stated. If it is informal, it may be corrected under the advice of the court; or, if it does not cover all the issues, it may be corrected in like manner, and for either purpose the jury may again be sent out. Except in these respects it cannot be altered or amended in any particular. The section of the statute quoted is the law upon the subject in this state (Pol. Code, sec. 4), and, though it must be liberally construed with a view to effectuate its objects and to promote justice, the court cannot go beyond its plain provisions. In the absence of such statute, we doubt not that it would be the duty of the court to do exactly what the statute permits, this course being required in order to obviate the necessity of another trial and the attendant expense and inconvenience. The doing of these acts in no wise interferes with the substantial rights of the parties. But the plain purpose of the provision is to prevent the receipt of informal or insufficient verdicts. It does not extend to matters going to the substance that do not appear upon their face. If the verdict covers the issue, and is complete on its face, the court must receive it, for it is the utterance of the jury to which the parties are of right entitled, without interference by the court. In the cases enumerated in section 1171 of the Code of Civil Procedure, upon application by the party aggrieved, a verdict may be set aside, but not otherwise. These provisions are explicit, and limit the power of the court to correct the decision or verdict in matters of substance, and the power must be invoked in the manner and within the time prescribed in sections 1172 and 1173. (*Ogle v. Potter*, 24 Mont. 501, 62 Pac. 920.) Any other rule would render the right of trial by jury nugatory, because, if inquiry could be made into the method pursued by the jury in one case, it

could with equal propriety be resorted to in all other cases. The consequence would be that a verdict would be the result of the judgment, not of twelve men, but of thirteen, the last being always the controlling factor.

In *Morris v. Burke*, 15 Mont. 214, 38 Pac. 1065, the identical question involved here was considered by this court. The trial court had submitted instructions under which, if the jury found for the plaintiff, the verdict should have been for a certain sum. The jury having returned a verdict for a less sum, the trial judge concluded that it was incumbent upon him to require a verdict to be returned according to the instructions, and in effect directed the jury to retire again and so find. The provisions of the Code then in force (Comp. Stats. 1887, Div. 1, secs. 271, 296-298) were substantially the same as sections 1090, 1171, 1172, and 1173, cited above. This court said: "The fact is that the court refused to receive the verdict, not because it was insufficient or informal, but the real ground of the refusal was the insufficiency of evidence to justify the verdict, and that it was against the law. But this is a ground for a motion for a new trial. (Code Civ. Proc., sec. 296, subd. 6.) A motion for a new trial is a matter of some formality. A statement is prepared and carefully stated, and the case is usually heard by the court, with both sides represented by counsel, and, if either party is dissatisfied, an appeal is taken to the supreme court upon the record so made. But the court in the case at bar, in refusing to receive the verdict, acted upon precisely the same ground which is one of the principal reasons for granting a motion for a new trial. It is our opinion that a question of so serious an import as setting aside a verdict because the evidence was insufficient to sustain it, or that it was against the law, the Code intended should be carefully heard and deliberately determined by the district court on a motion for a new trial, and not by the simple act of refusing to receive a verdict. In this view the provisions of section 271 of the Code of Civil Procedure still have a meaning, and, it appears to us, a very clear one. The idea is this: That, lest a party

should be unreasonably put to the labor of making a motion for a new trial by reason of a clerical error or informality having occurred in the verdict, or because the jury inadvertently omitted to find upon an issue presented, then, as a remedy against such accidents, we have the provisions of section 271, allowing such informalities to be corrected before they had gone too far." That case is conclusive upon the point involved here.

That a jury has resorted to chance in order to reach a verdict is one of the grounds of motion for a new trial enumerated in section 1171. Under the provisions of sections 1172 and 1173, the fact that chance has intervened in their deliberations must be made to appear to the court, on motion for a new trial, by affidavit, and in this particular case the verdict may be impeached by the affidavits of jurors themselves. On motions for new trials, it is frequently the case that there is a conflict in the evidence presented by the affidavits. This court will not interfere in such case with the action of the trial court upon the motion, unless there is a clear abuse of discretion. The action of the court in this instance amounted to a summary granting of a new trial on its own motion upon the unsworn statements made by some of the jurors. Doubtless, if the matter had come up regularly on motion for a new trial, there would have been dissenting jurors who would have contradicted the statements of those who had admitted that chance had entered into their deliberations. Hence, it is apparent that, if the course pursued by the trial court were permissible, it would lead to untold abuses, and allow the trial court to set aside, in its own discretion, all the provisions of statute touching motions for new trials. The order is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

CARLSON, RESPONDENT, v. BARKER, APPELLANT.

(No. 2,497.)

(Submitted February 5, 1908. Decided February 10, 1908.)

[93 Pac. 646.]

Partnership—Payment of Debts—Statute of Frauds—Appeal—Theory of Case—Pleading—Sufficiency—Instructions—Harmless Error.**Appeal—Theory of Case.**

1. On appeal the supreme court will treat a cause on the same theory it was tried in the district court.

Action for Wages—Complaint—Sufficiency.

2. In an action to recover wages due for services rendered to a partnership, of which defendant was a member, an allegation that the partners, upon winding up their affairs, had an accounting, and as part consideration for same, defendant agreed to pay plaintiff for the balance due him from the firm, while somewhat indefinite and uncertain, sufficiently stated a consideration for defendant's promise to pay plaintiff the money due him from the firm.

Pleading—Uncertainty—Special Demurrer.

3. If a defendant in a civil action desires a complaint to be made more definite and certain, he should file a special demurrer for that purpose in the trial court.

Appeal—Review—Harmless Error—Instructions.

4. In an action to recover wages due for services to a partnership of which defendant was a member, which it was alleged he agreed to pay upon a final settlement between the partners, an instruction that, unless defendant, at the time of making the promise, had funds of the partnership sufficient to pay the debt, there was no consideration for his promise, if erroneous, was harmless error, where the jury, by finding for plaintiff, must have found that defendant did have sufficient funds to pay the debt.

Partnerships—Liability of Partner.

5. *Quære*: Is a member of a partnership severally liable for services rendered to the partnership?

Statute of Frauds—Promise to Pay Debt of Another—Agreement by Partner to Pay Firm Debt—Consideration.

6. Section 3612, subdivision 3, of the Civil Code, provides that a promise to answer for the antecedent obligation of another need not be in writing, where the promise is made upon a consideration beneficial to the promisor. Upon the winding up of a copartnership of which defendant was a member, he retained certain partnership funds and agreed to pay plaintiff a debt due him for wages from the firm. *Held*, that defendant's promise was upon a consideration, beneficial to himself, under section 3612, and was valid, though not in writing.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Emil Carlson against David L. S. Barker. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Messrs. Downing & Stephenson, for Appellant.

Mr. A. C. Gormley, for Respondent.

Defendant having failed to interpose a special demurrer to the complaint on the ground of indefiniteness, he will not be heard to complain on appeal. (*Crane v. Grassman*, 27 Mich. 443; *Kean v. Mitchell*, 13 Mich. 207; *Dickinson v. Dustin*, 21 Mich. 561.) A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it. (9 Cyc. 377-384; *Miliani v. Tognini*, 19 Nev. 133, 7 Pac. 279; *Flint v. Cadenasso*, 64 Cal. 83, 28 Pac. 62; *Montgomery v. Rief*, 15 Utah, 495, 50 Pac. 624.) The contract in question here was not void under the statute of frauds. (*Sacramento Lumber Co. v. Wagner*, 67 Cal. 293, 7 Pac. 705; *Hamill v. Hall*, 4 Colo. App. 290, 35 Pac. 927; *Gilmore v. Skookum Box Factory*, 20 Wash. 703, 56 Pac. 934; *Nordby v. Winsor*, 24 Wash. 535, 64 Pac. 726; *Peters v. George* (Cal. App.), 81 Pac. 1117; *McCormick v. Johnson*, 31 Mont. 266, 78 Pac. 500.)

MR. JUSTICE SMITH delivered the opinion of the court.

This is an appeal from a judgment of the district court of Cascade county, and an order denying the defendant a new trial. The jury returned a verdict in favor of the plaintiff for the full amount demanded in the complaint. It is believed that a reference to the pleadings and the charge of the court will be sufficient to explain the nature of the action and the questions involved on the appeal, without any extensive recital of the evidence. The complaint reads as follows:

"The plaintiff complains of the defendant and alleges:

"First. That during the times hereinafter mentioned, the defendant, David L. S. Barker, and one Nels Carlson, and one Olaf Lindquist, were interested together as partners in a cer-

tain lease upon the Ripple quartz lode mining claim, near Neihart, Cascade county, Mont., the defendant, David L. S. Barker, owning a one-half interest in said lease and the said Nels Carlson and Olaf Lindquist, each owning a one-quarter interest in said lease.

"Second. That on or about the 9th day of July, 1903, the plaintiff was hired and employed as a miner by the said lessees, David L. S. Barker, Nels Carlson, and Olaf Lindquist, to work in the said Ripple mine, so leased by them, and was to receive the usual and customary wages of three and one-half dollars (\$3.50) per day; that the plaintiff continued to work for said parties as aforesaid until on or about the 1st day of April, 1904; that the value of his services at three and one-half dollars (\$3.50) per day amounted to eight hundred seventeen dollars and twenty-five cents (\$817.25); that the plaintiff has received from time to time, on account of said services, the sum of five hundred twenty-seven dollars and thirty-eight cents (\$527.38), leaving a balance due and unpaid of two hundred eighty-nine dollars and eighty-seven cents (\$289.87).

"Third. That when the said lessees of the Ripple mine ceased to work the same under their said lease on or about the 10th day of April, 1904, they had a settlement and accounting of all their business connected with said lease, and on said settlement and accounting, and as part consideration for the same, the defendant, David L. S. Barker, promised and agreed to pay the plaintiff the said balance of two hundred eighty-nine dollars and eighty-seven cents (\$289.87), due and unpaid him as aforesaid.

"Fourth. That the said sum of two hundred eighty-nine dollars and eighty-seven cents (\$289.87) has not been paid nor has any part thereof; that the defendant has refused to pay the same, though payment thereof has been demanded of him by the plaintiff."

There was no demurrer on the part of the defendant, but an answer was filed denying each and every allegation of the complaint. The court charged the jury as follows:

“You are instructed that the defendant in this case has denied all of the allegations of the complaint, and before the plaintiff can recover in this case he must prove by a preponderance of the testimony that the copartnership between the defendant, Nels Carlson, and Olaf Lindquist, existed, and during its existence that the plaintiff worked for said partnership, as alleged in the complaint, at the price of \$3.50 a day, that a balance remains due the plaintiff unpaid of \$289.87, that when said partnership ceased to work said lease the said partners had a settlement and accounting of all their business connected with said lease, and as a part consideration that defendant had moneys in his hands belonging to said copartnership, and promised and agreed with his copartners to pay the balance of \$289.87 alleged to be due the plaintiff; and, if you find the facts to be as set forth in this instruction, it will be your duty to return a verdict for the plaintiff for \$289.87, with interest at the rate of 8 per cent per annum from the 2d of August, 1906, unless you find from a preponderance of the testimony the facts to be as set forth in the next instruction.

“You are further instructed that, although you find from the evidence that the defendant, David L. S. Barker, and Nels Carlson made an agreement by which David L. S. Barker agreed to pay the plaintiff the sum of \$289.87, if you should further find that before the said Emil Carlson, the plaintiff herein, released the copartnership from said indebtedness, not notifying the said David L. S. Barker of his acceptance of him for the payment of said moneys, the said Nels Carlson and the said David L. S. Barker made another agreement by which the said David L. S. Barker paid the moneys in his hands to Nels Carlson instead of paying them to Emil Carlson, in that event you are instructed to find a verdict for the defendant in this case.

“It is not necessary, in order to make defendant liable, that he should have made to the plaintiff the promise to pay said \$289.87, but a promise in consideration of his having funds belonging to said copartnership sufficient to pay the same and made to his copartner, Nels Carlson, in a settlement of the co-

partnership affairs, with authority in Nels Carlson to make such settlement from his copartner Lindquist, would be sufficient to bind the defendant so far as the promise is concerned.

"You are instructed that it is not sufficient for you to find that the sum of \$289.87 was due and owing to the plaintiff from the firm of Carlson & Co., but that, in order to find for the plaintiff in this case, you must find also that the partners, David L. S. Barker, Nels Carlson, and Olaf Lindquist, had a settlement, and that in consideration of such settlement, the defendant, David L. S. Barker, promised and agreed to pay Emil Carlson the said sum of \$289.87, and, unless you find that there was such a settlement and such an agreement upon the part of the defendant, David L. S. Barker, you are instructed to find a verdict for the defendant.

"You are instructed further that, unless you find that the defendant, David L. S. Barker, had moneys in his possession amounting to \$289.87, belonging to the firm of Carlson & Co., that there would be no consideration for an agreement upon his part to pay the sum to the said Nels [Emil?] Carlson, plaintiff herein."

It will be seen from the foregoing that the cause was tried upon the theory that paragraph 3 of the complaint was a necessary and material part thereof, without which the complaint did not state a cause of action, and that the defendant was not severally liable to the plaintiff, and could not be sued alone for the partnership debt as such. We shall not examine the correctness of this theory, but shall treat the case as it was treated in the district court.

The first contention of the appellant is that the complaint does not state facts sufficient to constitute a cause of action, because paragraph 3, "construed most favorably to the plaintiff, does not state any consideration for the promise of the defendant to pay." We cannot agree with appellant's counsel in this view. Paragraph 3 does state, in a general way, that there was a consideration and what that consideration was. It is true that it does not state in detail what the arrangement between

the parties was. If the defendant desired to have the complaint made more definite and certain in this regard, he should have raised the point by special demurrer in the court below.

The district judge instructed the jury that before the plaintiff was entitled to recover he must show by a preponderance of the testimony (1) that the so-called copartnership composed of Barker, Nels Carlson, and Lindquist existed; that during its existence the plaintiff worked for it, as alleged in the complaint, at the price of \$3.50 a day, and a balance remained due and unpaid to him of \$289.87; (2) that the simple promise of the defendant Barker to pay this amount to the plaintiff was not sufficient to warrant a verdict for the plaintiff, but the jury must go further and find that at the time of making the promise the defendant had funds in his hands belonging to the copartnership sufficient to pay the amount; that unless Barker did have funds to that amount there would be no consideration for his agreement to pay the plaintiff. Whether the court below was right or wrong in imposing this additional limitation upon the plaintiff's right to recover is immaterial, because the jury found for the plaintiff, and must have found that the defendant did have this amount in his hands at the time he made the agreement with Nels Carlson, his copartner.

It only remains to be ascertained whether there is any testimony warranting such a finding. An examination of the testimony of Nels Carlson discloses the fact that he testified that at the time Barker promised to pay the plaintiff's claim, they were engaged in an effort to finally adjust the affairs of the copartnership; that it was ascertained that the firm owed the sum of \$852.11, of which Barker agreed to pay one-half, and Nels Carlson and Lindquist the other half; that at this time Barker had in his possession the sum of \$471.69 belonging to the partnership, being the proceeds of certain ore sold by the firm to the East Helena smelter; that in the settlement this fact was taken into consideration, and the portion of the debts Barker was to pay was ascertained and adjusted on the basis of his retention of the whole amount received from the smelter. There

is no other matter involved in the appeal save this one question of fact. The district court submitted the case to the jury upon this theory, and the jury resolved the issue in favor of the plaintiff. The defendant does not complain of the instructions of the court, but insists that the promise of Barker, made to his copartner, to pay the plaintiff's claim, was without consideration and within the statute of frauds, because not in writing.

We may assume, in passing, that Barker was not severally liable for the plaintiff's claim, although, in the light of sections 3250 and 1940 of the Civil Code, there may be grave doubts upon that subject, and we do not resolve them; but there can be no doubt that under the testimony of Nels Carlson, stamped as true by the verdict of the jury, an independent consideration passed to the defendant, Barker, and that his agreement to pay the claim was a good promise, by virtue of the provisions of section 3612 of the Civil Code, which reads as follows: "A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing: * * * (3) Where the promise being for an antecedent obligation of another * * * is made upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person." (See *McCormick v. Johnson*, 31 Mont. 266, 78 Pac. 500.)

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

O'FLYNN, RESPONDENT, v. CITY OF BUTTE, APPELLANT.

(No. 2,483.)

(Submitted February 4, 1908. Decided February 10, 1908.)

[93 Pac. 643.]

Cities and Towns—Personal Injuries—Defective Sidewalks—Notice of Claim—Evidence—Instructions—Appeal.**Cities and Towns—Personal Injuries—Defective Sidewalks—Notice of Claim.**

1. Where, in an action against a city for personal injuries, a notice of claim for damages, marked "filed" by the city clerk and bearing an indorsement that the claim had been referred to the judiciary committee of the council and disallowed, was received in evidence without objection, the requirements of Laws of 1903, page 166, relative to giving notice of such a claim, were shown to have been sufficiently complied with.

Same—Defects in Sidewalk—Latent—Patent.

2. The testimony, in an action against a city for damages for personal injuries sustained on account of a defective sidewalk, on the question whether a board in the walk was broken and the defect in it discernible to the eye or not, having been conflicting, and the jury having returned a verdict in favor of the plaintiff, it will be held that the defect was not latent, but could be seen.

Same—Defects in Walk—Imputed Knowledge.

3. *Held*, in the above action, where actual notice of the defective sidewalk on the part of the city had not been shown, that the court (under the evidence examined) properly submitted to the jury the question whether knowledge of the faulty condition of the walk could be imputed to the defendant.

Same—Evidence—Admissibility.

4. The daughter of plaintiff in the action above told a girl friend where her mother fell. The friend, as a witness in the cause, deposed to the fact that she fell at the same place, identifying it. There was also testimony that no broken boards other than the one alleged to have been the cause of the injury, existed in the immediate vicinity. *Held*, that the admission in evidence of the daughter's statement that she told her friend where her mother claimed to have been hurt was not prejudicial error.

Same—Instructions—Presumptions.

5. An instruction that a person in the exercise of ordinary care, and without knowledge of any defects in, or the dangerous condition of, a sidewalk, might rely on the presumption that the sidewalk was in an ordinarily safe condition for travel, was not objectionable for failure to charge that, if the traveler had previous knowledge of the dangerous condition of the walk, the presumption did not apply. The rule laid down was correct, and if defendant relied upon plaintiff's knowledge as nullifying the effect of the presumption, it should have asked an instruction covering the point.

Same—Defective Walks—Notice—Instructions.

6. An instruction charging the jury that a city must have had either actual or constructive notice of the defective condition of a sidewalk for a sufficient length of time prior to the injury claimed to have been sustained on account thereof, so as to enable it to repair the walk, was not objectionable as outside of the issues, where the complaint averred that the defendant carelessly and negligently permitted the walk to be and remain in a dangerous and unsafe condition for a long time prior to the date of the accident, and that this condition was "for a long time prior to the injury known to the defendant," thus sufficiently negating the idea that the defect was not known to defendant for a sufficient length of time to enable it to repair it.

Same—Evidence—Sufficiency.

7. Where, in an action for injuries caused by a defective sidewalk, a witness testified that she had fallen on the walk at the same place a week before, and that two days after plaintiff was injured the loose plank which constituted the defect was in the same condition as when witness fell, the proof was sufficient to go to the jury on the question whether the condition of the walk remained the same from the time the witness fell until plaintiff was injured.

Appeal—Evidence—Objections not Raised in District Court.

8. An objection to the introduction of testimony not urged in the district court will not be reviewed on appeal.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Ellen O'Flynn against the city of Butte. Judgment for plaintiff, and defendant appeals from it, and an order denying a new trial. Affirmed.

Mr. Edwin S. Booth, for Appellant.

A city will not be imputed with knowledge of a defect in a sidewalk of such a nature as to have escaped the notice of a person injured thereby who had used it continually for many months. (*Byrne v. Philadelphia*, 211 Pa. St. 598, 61 Atl. 80.) A municipal corporation will not be liable for injuries due to latent defects in its streets and sidewalks, which could not be discovered by ordinary care and diligence. (*City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318; *Elliott on Roads and Streets*, 2d ed., par. 862, and cases cited.) A public corporation is under no greater obligation to exercise greater care in discovering latent defects than a private person under the same circumstances and condition. (3 *Abbott on Municipal Corporations*, p. 2342.)

Upon the appellant's contention as to the admissibility in evidence of the testimony of Mary O'Flynn, wherein she was allowed to state what she had told the witness, Christie Sullivan, as to the place where the injury occurred, which was followed by the testimony of Christie Sullivan, over the objection of defendant, as to a previous accident having happened to her at the same place, the objection is based upon the ground that the testimony which had for its purpose the identifying of the place where the former accident occurred with the place where the plaintiff was injured, was hearsay and clearly incompetent as not being a permissible identification of the place. (*McGrill v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955.)

If the evidence of Christie Sullivan was admitted on the theory of notice, it should have been followed by proof showing that the condition remained the same from the time that she was injured until the date of the injury to plaintiff. (*Hunt v. Dubuque*, 96 Iowa, 314, 65 N. W. 319; *Bailey v. Centerville*, 108 Iowa, 20, 78 N. W. 831.) Ordinarily, evidence of previous similar accidents at the same place is not admissible to prove negligence at the time in question in a particular case. (*Elliott on Evidence*, par. 2506; *Potter v. Cove*, 123 Iowa, 98, 98 N. W. 569; *Matthews v. Cedar Rapids*, 80 Iowa, 459, 20 Am. St. Rep. 436, and note, 45 N. W. 894; *Richards v. Oshkosh*, 81 Wis. 226, 51 N. W. 256, 257; *Goble v. Kansas City*, 148 Mo. 470, 50 S. W. 84; *Davis v. Oregon R. Co.*, 8 Or. 172; *Grand Rapids R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321.)

Mr. John J. McHatton, for Respondent.

A person traveling upon a sidewalk of a town or city, which is in constant use by the public, has a right, when using the same with reasonable diligence and care, to presume, and to act upon the presumption that it is reasonably safe for ordinary travel throughout its entire width, and free from all dangerous obstructions or other defects. (*Ashley v. City of Aberdeen* (Wash.), 90 Pac. 210; *Oklahoma City v. Reed*, 17 Okla. 518, 87 Pac. 646; *Hammock v. City of Tacoma* (Wash.), 87 Pac. 924;

Town of Norman v. Teel, 12 Okla. 69, 69 Pac. 791; *Gallamore v. City of Olympia*, 34 Wash. 379, 75 Pac. 978.) Evidence that one with whose knowledge the city was not chargeable observed a defect before the accident is admissible to show its discoverable character. (*City of Ottawa v. Hayne*, 214 Ill. 45, 73 N. E. 385; *Leonard v. City of Butte*, 25 Mont. 410, 65 Pac. 425; *Bell v. City of Spokane*, 30 Wash. 508, 71 Pac. 31; *Smith v. City of Seattle*, 33 Wash. 481, 74 Pac. 674; *Johnson v. Park City*, 27 Utah, 420, 76 Pac. 216; *Brown v. City of Blaine*, 41 Wash. 287, 83 Pac. 310; *Harris v. Town of Mt. Vernon*, 41 Wash. 444, 83 Pac. 1023; *Austin v. City of Bellingham* (Wash.), 88 Pac. 834; *Piper v. City of Spokane*, 22 Wash. 147, 60 Pac. 138.) It is permissible for the purpose of identification, to call a witness and have him testify to things which, under other circumstances, might be considered hearsay. (*State v. Dunn*, 109 Iowa, 750, 80 N. W. 1068; *Stewart v. Anderson*, 111 Iowa, 329, 82 N. W. 770; *Commonwealth v. Sullivan*, 123 Mass. 221; *People v. Meade*, 50 Mich. 229, 15 N. W. 95; *Cole v. Lake Shore & M. & S. Ry. Co.*, 105 Mich. 549, 63 N. W. 647; *People v. Zimmerman*, 65 Cal. 307, 4 Pac. 20.)

Generally, where there are apparent and obvious defects in the street so near and closely related to a condition therein apparently safe, but in fact defective, that an investigation of the former would lead to a knowledge of the latter, the city may thereby be charged with notice of the matter. (*Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450; *Brown v. Swanton*, 69 Vt. 53, 37 Atl. 280; *Grattan v. Williamston*, 116 Mich. 462, 74 N. W. 668; *Huff v. Marshall*, 97 Mo. App. 542, 71 S. W. 477; *Beaver v. Eagle Grove*, 116 Iowa, 485, 89 N. W. 1100; *Colorado City v. Smith*, 17 Colo. App. 172, 67 Pac. 909; *Aurora v. Hillman*, 90 Ill. 61; *Hammock v. City of Tacoma* (Wash.), 87 Pac. 924; *Town of Norman v. Teel*, 12 Okla. 69, 69 Pac. 791; *Durham v. City of Spokane*, 27 Wash. 615, 68 Pac. 383; *Shearer v. Town of Buckley*, 31 Wash. 370, 72 Pac. 76; *Smith v. City of Seattle*, 33 Wash. 481, 74 Pac. 674.)

A city is chargeable with knowledge of the natural tendency of timber to rot and decay by lapse of time and exposure to weather, or to become worn out and dangerous by natural decay and long usage. (*Sherwood v. District of Colorado*, 3 Mackey, 276, 51 Am. Rep. 776; *Town of Wheaton v. Hadley*, 131 Ill. 640, 23 N. E. 422; *City of Indianapolis v. Scott*, 72 Ind. 196; *Furnell v. City of St. Paul*, 20 Minn. 117; *Peterson v. Vil. of Cokato*, 84 Minn. 205, 87 N. W. 615; *Fritz v. City of Watertown* (S. Dak.), 111 N. W. 630.)

In the absence of statute, there is no rule of law as to the length of time during which the defect must have existed in order to create a presumption that the city had notice of its existence. (*Kelly v. City of Butte*, 34 Mont. 530, 87 Pac. 968; *District of Colorado v. Payne*, 13 App. (D. C.) 500; *Evansville v. Senhenn*, 26 Ind. App. 362, 59 N. E. 863; *Graham v. Oxford*, 105 Iowa, 705, 75 N. W. 473; *Burns v. Emporia*, 63 Kan. 285, 65 Pac. 260; *Decatur v. Besten*, 169 Ill. 340, 48 N. E. 186; *Hodges v. Waterloo*, 109 Iowa, 444, 80 N. W. 523; *Laurie v. Ballard*, 25 Wash. 127, 64 Pac. 906; *Rhyner v. Menasha*, 107 Wis. 201, 83 N. W. 303; *Cady v. City of Seattle*, 42 Wash. 402, 85 Pac. 19; *Town of Norman v. Teel*, 12 Okla. 69, 69 Pac. 791.)

Mr. JUSTICE SMITH delivered the opinion of the court.

Plaintiff brought this action to recover damages for injuries alleged to have been received by her through stepping upon a defective plank in a sidewalk in the defendant city. She had a verdict in the district court of Silver Bow county for the sum of \$5,000. Judgment was entered in her favor for that amount, and from such judgment and an order denying a new trial, the city appeals.

The first contention of the appellant is that no notice to the city council was given of the claim of plaintiff, as provided by section 1 of an Act relating to actions against cities and towns for damages to persons injured on streets and other public grounds. (Laws 1903, p. 166.) That Act provides that "Before any city or town shall be liable for damages, for or

on account of any injury or loss alleged to have been received or suffered by reason of any defect in any bridge, street, road, sidewalk, culvert, park, public ground, ferry-boat or public works of any kind, * * * the person so alleged to be injured * * * shall give to the city or town council, or other governing body of such city or town, within sixty days after the alleged injury, notice thereof; said notice to contain the time when and the place where said injury is alleged to have occurred." No discussion of this question is found in the brief of counsel for the appellant, and the court would, for that reason, be justified in passing it. We find, however, from the record, that at the trial, written notice of the injury and a claim for damages containing the time when and the place where the injury was alleged to have occurred was offered and received in evidence, without objection. The claim is indorsed: "Marked No. 1,200, claim of Ellen O'Flynn for injuries, filed on the second day of Sept. 1904. P. H. Sibley, City Clerk." Also: "Disposition. Sept. 7, 1904. Read and referred to judiciary committee. Oct. 19, 1904, disallowed." The reference to the judiciary committee seems to show that the claim was presented to the city council, and that is evidently the fact; otherwise the city attorney would have objected to the admission of the paper in evidence.

The plaintiff testified that she was passing along the sidewalk in question, accompanied by her son. She said: "We came to 521 North Wyoming street and without any cause I kicked my foot against a board which stuck a little bit out, and in the meantime my son stepped on the end and the board sprang up, and in the meantime my two feet got tangled in the hole." It is contended by the appellant that the evidence is insufficient to show that the alleged defective condition of the sidewalk "had existed for such a length of time that the defendant, through its officers, had actual notice thereof, or that by the exercise of any, except the most extraordinary, care, could have had notice or knowledge thereof. From all of the evidence it appears that the defect, if any existed, was latent, else it would

have been discernible to plaintiff herself who had used the sidewalk at least once a week for many months prior to the time."

It is true that there was testimony on the part of the defendant to the effect that the defective condition of the sidewalk was not discernible to the eye, that the defect consisted in the fact that one or more boards were not nailed down to the stringers, and that there was no broken board. The plaintiff's witnesses, however, testified that one board was broken. Plaintiff herself said at the trial: "The sidewalk was broke about two feet in off the street, and this long board which was loose, without anything in it, projected over that hole. There was nothing to steady that board, and my son stepped on that and it popped up." As the jury evidently believed the testimony of the plaintiff and her witnesses on this subject, having returned a verdict in her favor, we must conclude that the defective condition of the sidewalk was not latent, but that it could be seen.

No actual notice of the condition of the walk was brought home to the city, so that it becomes necessary to inquire whether knowledge of the defect can be imputed to the defendant; and in this connection we have this testimony of the plaintiff: "I went over this sidewalk every week. As to whether I was familiar with this sidewalk prior to the time I fell, I used to pass there, and it was always in pretty bad shape. I noticed that. I did not notice the particular condition of the walk at the place I fell. I was not referring to about the same place I fell. I was referring to all along the sidewalk. There were several breaks further up and down."

Mrs. Richards testified: "The board was broken like in the center, kind of split and raised up at both sides. * * * I picked up the board, and then I laid it down * * * because I thought somebody else would fall on it. When the board was laid against the fence there was kind of a hole under where the board had been. There were two parts of the broken board, and I think one was a little longer than the other. The outside portion of the board next the street was a little higher than the one next the fence. When I picked up the portion next

to the fence the portion next to the street was still lying there, kind of tilted up from the outside of the walk."

Miss Christie Sullivan testified: "There was a hole in the sidewalk. I fell down there myself a week before. The board was broken in two, and that is what caused the hole in the sidewalk." Margaret Sullivan, a sister of Christie, testified that she was with her sister when she fell, and that the board was broken.

The plaintiff offered in evidence sections 5 and 19 of Ordinance No. 120 of the defendant city, reading as follows:

"Sec. 5. It shall be the duty of the street commissioner to inspect all sidewalks, and keep the same in repair and in a safe and passable condition and to inspect daily the reports of the police officers for information relative to their condition. Whenever a sidewalk needs renewal he shall report the same to the city council, giving the name of the street, the lot and block number or other description and the name of the owner, if known."

"Sec. 19. It shall be the duty of the city marshal and all policemen to report to the street commissioner or note upon their daily reports all defects in sidewalks, and in case of accident they shall report the particulars to their superior officer, together with the names of any witnesses, if known to them." (See *Leonard v. City of Butte*, 25 Mont. 410-417, 65 Pac. 425.)

In the light of this evidence we think the question whether this patent defect had existed for such a length of time as to charge the defendant city with notice thereof should have been, as it was, submitted to the jury.

But it is contended by the counsel for appellant that the testimony of the witness, Christie Sullivan, was improperly admitted, for the reason that the place where she fell was not identified as being the same place where Mrs. O'Flynn was injured. Plaintiff testified that she told her daughter Mary where she fell, and that the place was in front of the premises No. 521 North Wyoming street, occupied by Charles Ferns. Mary testified that she afterward visited the place and told Christie Sullivan

where the mother claimed to have been hurt. She said: "It was 521 North Wyoming street that mamma was hurt, and I told her [Christie] the place and how it happened." Christie Sullivan then testified: "She [Mary] told me where her mother claimed to be injured. I know 521 North Wyoming street, Ferns' place." After describing the place where she fell she continued: "I saw this plank a couple of days after Mrs. O'Flynn fell, and the condition was just about the same. It had not changed. * * * There might have been other broken places, but I did not notice them." Patrick O'Flynn, the husband of plaintiff, testified that he examined the place where his wife said she was injured, that he examined the broken board, and that there was no other board broken in front of No. 521 or in the immediate vicinity of that sidewalk. It appears, therefore, that Christie Sullivan had personal knowledge of the place where she fell. She identified it as in front of No. 521 North Wyoming street, Chas. Ferns' place. This being the same place where plaintiff was injured, we think there was no prejudicial error in permitting Mary to state that she told Christie where Mrs. O'Flynn claimed to have been injured, especially in view of the fact that there appears to have been no other broken board in the immediate vicinity.

Appellant objects to instruction No. 5 which reads as follows: "You are instructed that a person, in the exercise of ordinary care, and without knowledge of any defects in or dangerous condition of, the sidewalk, is entitled to rely upon the presumption that the sidewalk is in an ordinarily safe condition for travel, and that they are not exposing themselves to danger while walking thereon and thereover." It is said that the court should have told the jury in this connection that the presumption referred to is a rebuttable one, "and in the event of there being evidence showing upon the part of the traveler a previous knowledge of the dangerous condition of the sidewalk then the presumption does not apply." But the answer to this criticism is that the rule of law is not changed in any event by knowledge on plaintiff's part. The rule remains the same whether applica-

ble to the particular case or not. In this case it may have been a question whether plaintiff had knowledge of the defect; if so, that was for the jury to determine, under proper instructions, and if defendant's counsel relied upon that knowledge on her part as nullifying the effect of the presumption, an instruction covering the point should have been requested. No other complaint is made of this instruction.

It is said of instructions Nos. 2, 8, 9, and 12 that they do not follow the issues in the case, by reason of the fact that the complaint fails to allege that the defendant had notice or knowledge of the defect in the sidewalk in time sufficient to have repaired the same. The allegations of the complaint are that the defendant carelessly and negligently permitted the sidewalk to be and remain in a dangerous and unsafe condition "for a long time" prior to the date of the injury, and that this condition of the sidewalk was, at the time of the injury and "for a long time prior thereto, known to the defendant." The allegations of carelessness and negligence negative the idea that the defect was not known to the defendant for a sufficient length of time prior to the injury to enable repairs to be made, and in each of the instructions last referred to, the court covered the point by telling the jury that the defendant must have had notice, actual or constructive, of the defective condition for a sufficient length of time prior to the injury to enable it, in the exercise of reasonable diligence, to repair or remedy the same.

Again, it is said that, if the evidence of Christie Sullivan was admitted on the theory of constructive notice to defendant by reason of the length of time the walk was out of repair—and we understand, from reading the record, that that was the theory of the plaintiff in introducing it—then that testimony should have been followed by proof that the condition of the walk remained the same from the time that she fell until the date of the injury to the plaintiff. Assuming that defendant's counsel are correct in their deduction, the contention is disposed of by the quotation heretofore made from the testimony of Christie

Sullivan. She testified that two days after Mrs. O'Flynn was injured the plank was in the same condition as when the witness fell. We think this testimony was sufficient to warrant the court in submitting the question to the jury.

We have said that it is apparent to us from the record that the testimony relating to the accident to Christie Sullivan was admitted by the court as bearing upon the length of time the defect had existed in the sidewalk, and not as proof of the dangerous character of the walk. Defendant seems to argue, although not very strenuously—perhaps it is merely a suggestion—that the testimony was not competent for any purpose. But no such objection was urged at the trial. The witness was asked this question: "Now, do you know of anything being wrong with the sidewalk at that particular place up there at any time prior to the time Mary O'Flynn told you about her mother being hurt?" "Mr. Forestell: Objected to for the reason that the location and time are not fixed, and for that reason it is incompetent, irrelevant, and immaterial." After the witness had answered that she fell there herself a week before, because of a hole in the sidewalk, the city attorney said: "Objected to as incompetent, irrelevant, and immaterial, and move that the answer be stricken out for the reason that it is too remote." It appears, therefore, that the objection that this testimony was incompetent for any purpose, either as bearing upon notice to the city or the dangerous character of the sidewalk, was never urged in the court below.

We find no reversible error in the case, and the judgment and order appealed from are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY con-
cur.

KROEGER, RESPONDENT, v. PASSMORE, APPELLANT.

(No. 2,475.)

(Submitted February 3, 1908. Decided February 10, 1908.)

[93 Pac. 805.]

*False Imprisonment—Nonsuit—Directed Verdict—Evidence—Sufficiency—Malice—Defenses—Excessive Damages—Instructions.***False Imprisonment—Nonsuit.**

1. Evidence of plaintiff, in an action for false imprisonment, examined, and held to justify the refusal of a motion for nonsuit.

Same—Evidence—Instructed Verdict.

2. Where the evidence of defendant, in an action for false imprisonment, did not make out so clear and indisputable a case as would have justified the court in giving a peremptory instruction for a verdict in his favor, its refusal to so direct was not error.

Same—Evidence—Sufficiency.

3. Evidence held sufficient to warrant recovery in an action for false imprisonment, where plaintiff was detained by defendant in his office for a period of about forty-five minutes, in an endeavor to secure from plaintiff a deed handed to her for inspection, and which she thereafter declined to return to defendant.

Same—What Constitutes.

4. All that is necessary to constitute false imprisonment is an individual's detention without sufficient legal cause therefor, and neither malice nor, ordinarily, want of probable cause, is an element of the right to recover damages.

Same—Excessive Damages.

5. Where, in an action for false imprisonment, the evidence showed that plaintiff was detained in defendant's office for about three-quarters of an hour in an effort on defendant's part to obtain from her a deed handed to her for inspection, and which she refused to return, and that the result of such detention was sickness, nervousness, humiliation and disgrace to plaintiff, a verdict for \$250 held not to be excessive.

Same—Defenses.

6. Treating false imprisonment as a tort, as distinguished from a crime, the only defenses which may be interposed are a denial of the imprisonment and a justification thereof.

Same—Conflicting Evidence—Review.

7. Where the evidence on the question of the false imprisonment of plaintiff was conflicting and sufficient to have justified a finding in favor of either party to the action, the verdict of the jury will not be disturbed.

Same—Justification.

8. When a private person seeks to justify the imprisonment by him of another, he must show that he has complied with the law which warrants such imprisonment.

Same—Justification—Instructions.

9. An instruction requested by defendant, in an action for false imprisonment, to the effect that the law gives a private person the right to arrest another when the party arrested has committed, or is about to commit, a public offense in the presence of the party arresting (Pen. Code, sec. 1633), and that if the jury believed that plaintiff had taken from defendant property of the latter which he was attempting to recover at the time of the alleged imprisonment, verdict should be for defendant, was properly denied, since it failed to call the attention of the jury to the further fact that, in order to justify the imprisonment, the person arresting must have taken the one arrested before a magistrate without unnecessary delay, or delivered him to a police officer (Pen. Code, sec. 1643).

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Lavina Kroeger against Charles S. Passmore. From a judgment for plaintiff, and from an order denying defendant's motion for new trial, he appeals. Affirmed.

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Mr. C. M. Parr, for Appellant.

Though force be employed against the person of another, not for the purpose of detaining him or restraining his liberty, but to obtain possession of a chattel, it has been held there is no false imprisonment. (*McClure v. State*, 26 Tex. App. 102, 9 S. W. 353.) An arrest by a private individual is justified for a public offense committed or attempted in his presence. (*Burns v. Erben*, 40 N. Y. 463; *Holley v. Mix*, 3 Wend. 350, 20 Am. Dec. 702; *Hershey v. O'Neil*, 36 Fed. 168; *Samuel v. Payne*, 1 Doug. 359; *Davis v. Russell*, 5 Bing. 354; *Rohan v. Sawin*, 5 Cush. 281; *Bulkeley v. Keteltas*, 6 N. Y. 384; *McCormick v. Sisson*, 7 Cow. 715; *Elder v. Morrison*, 10 Wend. 128, 25 Am. Dec. 548; *Oystead v. Shed*, 12 Mass. 511; *Gelzenleuchter v. Niemeyer*, 64 Wis. 321, 54 Am. Rep. 616, 25 N. W. 442; *Balbo v. People*, 80 N. Y. 499; *Meyer v. Clark*, 41 N. Y. Sup. Ct. (9 Jones & S.) 111; *Phillip v. Trull*, 11 Johns. 486; *Morley v. Chase*, 143 Mass. 396-398, 9 N. E. 767.)

Messrs. Mackel & Meyer, for Respondent.

It is not necessary that the detention of a person be done forcibly, or that the individual be actually confined or assaulted, or even that he would be touched; false imprisonment may be committed by words alone. (*Moore v. Thompson*, 92 Mich. 498, 52 N. W. 1000; *Floyd v. State*, 12 Ark. 43, 54 Am. Dec. 250; *Hawk v. Ridgway*, 33 Ill. 473; *Müller v. Ashcraft*, 98 Ky. 314, 32 S. W. 1085; *Woodward v. Washburn*, 3 Denio, 369; *Harkins v. State*, 6 Tex. App. 452; *Ahern v. Collins*, 39 Mo. 145.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action for damages for false imprisonment. The plaintiff had judgment. The defendant moved for a new trial, which motion was denied by the trial court upon condition that the plaintiff remit \$250 of the amount of the verdict, which was done. Defendant thereupon appealed from the judgment and from the order denying him a new trial.

The errors assigned by the appellant are insufficiency of the evidence to justify the verdict, the refusal of the trial court to grant a motion for a nonsuit, refusal to direct a verdict for defendant, and refusal of the court to give the following instruction: "The court instructs the jury that the law of this state gives a private person the right to arrest another when the party arrested has committed, or is about to commit, a public offense in the presence of the party arresting; and in this case, if you believe from the evidence that plaintiff had taken from defendant property of defendant, and that defendant was attempting to recover his property from plaintiff at the time plaintiff alleges she was restrained, then your verdict must be for the defendant."

In 1905 Henry Kroeger and Lavina Kroeger owned and occupied certain real estate in Butte, at 811 West Galena street. In November of that year Henry Kroeger listed the property for sale with the defendant, a real estate agent, the selling

price agreed upon at that time being \$6,000. In March, 1906, Passmore had an offer for the property at \$5,750, made by Mrs. Cora L. Lindsay. He thereupon made what he understood to be satisfactory arrangements with the Kroegers for a sale of the property at that price, \$2,000 of which was to be paid in cash. On March 27, 1906, Henry Kroeger executed a deed conveying the property, and he and Mrs. Lindsay put the deed in escrow with Passmore as depositary, under an agreement that upon the further payment by Mrs. Lindsay of the sum of \$3,750 within sixty days, with interest at eight per cent per annum, the deed was to be delivered to her. The parties apparently all understood that Mrs. Kroeger was to sign the deed and escrow agreement, and on March 28th Passmore took the deed and agreement to Mrs. Kroeger for the purpose of having her execute them. Some misunderstanding arose as to the amount of money to be paid at that time, and consideration of the matter went over until the following day. On the afternoon of March 29th, Mr. and Mrs. Kroeger went to Passmore's office by appointment with him. As to what occurred there at that time, the evidence is very conflicting.

The jurors were the exclusive judges of the credibility of the witnesses; and, by the general verdict in plaintiff's favor, they indicated that they believed the version presented by her and her witnesses, which was to the effect: That she and her husband went into Passmore's office, which was in the front of a building occupied by him, the entrance to the office being through a narrow passageway between the end of a high desk and the wall of the building; that Mr. and Mrs. Kroeger sat down in the office; that Passmore then asked Mrs. Kroeger if she would sign the deed, to which she replied, "Yes; if you have the check for me," meaning a check for the remaining \$3,750, which amount Mrs. Kroeger contends was to be paid at that time; that Passmore handed Mrs. Kroeger the deed; that she read it and kept it; that Passmore requested her three or four times to return the deed to him, and that she refused to do so; that, after reading the deed, she told Passmore that she knew

it was hers, and that Passmore then said, "You cannot leave this office until you give me that," and turned to his brother, saying, "John, call the sheriff"; that Passmore closed the door, and stood in the passageway leading into the office; that Mrs. Kroeger got up to leave the office, and that it was then that Passmore made the remark that she could not leave the office with the deed; that she was detained there about three-quarters of an hour from the time she got the deed until her attorney arrived, soon after which she was permitted to leave; and that during the time she was detained there, there were many persons in the office and others about the building. With respect to the effect of the detention upon the plaintiff, she testified: "The effect of all this was to make me very nervous. I was sick from the shock of it. You might know what effect it had on me. I was never in that position before. As to what effect it had on me when he threatened to call the sheriff, I said, 'If you call the sheriff, you must call a carriage,' because I could not have such a disgrace. I made the remark, and he was there, and I was very nervous. I was very much humiliated and disgraced. I felt that I was disgraced. After that I did not leave the house for nearly a week."

In view of the evidence introduced on behalf of the plaintiff, the court was clearly correct in denying the motion for a nonsuit, and also the motion for an instructed verdict; for "the defendant's evidence, though contradictory in some particulars of that put in by the plaintiff, did not make out a case so clear and indisputable as would have justified the court in giving the peremptory instruction requested." (*Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45.)

False imprisonment is treated as a tort, and also as a crime. The definition is the same in either case. In our Code it is defined as "the unlawful violation of the personal liberty of another." (Pen. Code, sec. 420.) It has been held that the liability of the wrongdoer does not depend primarily upon his mental attitude. (19 Cyc. 319.) Neither malice nor, ordinar-

ily, want of probable cause, is an element of the right to recover. (19 Cyc. 320.) "All of the authorities declare that neither malice nor, ordinarily, want of probable cause is an essential element of the right of action. If the imprisonment is lawful, it does not become unlawful because done with malicious intent. If the conduct is unlawful, neither good faith, nor provocation, nor ignorance of the law is a defense to the person committing the wrong, in a civil, as distinguished from a criminal, proceeding. The normal effect of malice or absence of malice is respectively to aggravate or mitigate the damages." And, again, it is said: "False imprisonment may be committed by words alone, or by acts alone, or by both. It is not necessary that the individual be actually confined or assaulted or even that he should be touched. But there must be personal coercion of some sort exercised by defendant over plaintiff in order to subject the former to liability." (19 Cyc. 323.) In *Comer v. Knowles*, 17 Kan. 436, it is said: "False imprisonment is necessarily a wrongful interference with the personal liberty of an individual. The wrong may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or by both. It is not necessary that the individual be confined within a prison, or within walls; or that he be assaulted, or even touched. It is not necessary that there should be any injury done to the individual's person, or to his character or reputation. Nor is it necessary that the wrongful act be committed with malice, or ill-will, or even with the slightest wrongful intention. Nor is it necessary that the act be under color of any legal or judicial proceeding. All that is necessary is that the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he fears to disregard." Under these authorities it is apparent that the evidence is sufficient to support a verdict in favor of the plaintiff. (See, also, 12 Am. & Eng. Ency. of Law, 2d ed., 736, and cases cited.)

But it is said that the evidence is not sufficient to sustain a verdict or judgment for \$250. The trial court properly called the attention of the jury to the provisions of section 4330 of the Civil Code as to the measure of damages in a case of this character, and after a careful consideration of the entire case as made, and upon a review of it on motion for new trial, that court reduced the amount of the verdict from \$500 to \$250, and with its determination as to the fairness of the amount of the reduced verdict we do not feel inclined to interfere.

Treating false imprisonment as a tort, as distinguished from a crime, the only defenses which may be interposed will at once be suggested: (1) A denial of the imprisonment; and (2) a justification of the imprisonment. Apparently defendant relied upon both of these defenses. So far as the question of plaintiff's imprisonment is concerned, the answer is a general denial of the allegations of the complaint; and the evidence offered on behalf of the defendant is ample, if believed by the jury, to make out this first defense completely. But by the general verdict the jury manifested its determination not to accept as the facts the defendant's version of what occurred in his office on March 29th; and, since the evidence is conflicting, we cannot interfere, as it is sufficient to have justified a finding for either party with respect to that particular matter.

By offering the instruction set forth above, the defendant evidenced his intention to rely upon the second defense as well as the first. But the instruction is erroneous, and was properly refused. It falls far short of stating the rule applicable to that defense. Under our system of government we do not recognize the right of a private individual to take the law into his own hands to redress his grievances. The law itself furnishes him an ample remedy. When a private person, then, seeks to justify his imprisonment of another, it must appear that he has complied with the law which warrants such imprisonment. The particular provisions of the law which defendant invokes are found in section 1633 of the Penal Code, which section reads as follows: "A private person may arrest

another: (1) For a public offense committed or attempted in his presence; (2) When the person arrested has committed a felony, although not in his presence; (3) When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it." But in connection with this section there must also be read section 1643, which is a part of the same chapter of the Code, relates to the same subject-matter, and may rightly be said to be a limitation upon the provisions of section 1633 above. The latter section reads as follows: "A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer." Assuming, then, for the sake of this argument, everything in favor of the defendant as claimed by his counsel with respect to this defense, it appears at once that the offered instruction does not cover the ground, in that it does not call the attention of the jury to all of the facts which must be made to appear under sections 1633 and 1643 above in order to constitute a justification of the defendant.

We find no error in the record. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

Rehearing denied March 4, 1908.

MANUEL, ADMINISTRATRIX, RESPONDENT, v. TURNER, ADMINISTRATRIX, ET AL., APPELLANTS.

(No. 2,498.)

(Submitted February 6, 1908. Decided February 13, 1908.)

[93 Pac. 808.]

Foreclosure—Judgment—Default—Extent of Relief—Stipulations—Pleadings—Husband and Wife—Dower.

Foreclosure—Default—Stipulation—Extent of Relief.

1. Where, in a foreclosure suit, the principal defendants entered into a stipulation with plaintiff that they had no defense, would file no answer, and that judgment might be entered against them in accordance with the prayer of the complaint, it was error for the court to direct in its decree not only the sale of the property and the application of the proceeds to the satisfaction of the mortgages, but also the application of the surplus to the satisfaction of judgments set up in plaintiff's replication to the answer of another defendant, holding liens on the property, since, under section 1003, Code of Civil Procedure, and under the stipulation the decree should have been entered according to the prayer of the complaint.

Judgment—Pleadings to Sustain—Reply.

2. A judgment for plaintiff for affirmative relief cannot be based upon allegations which appear in the reply only.

Replication—Aiding Complaint.

3. The replication cannot be looked to to broaden the scope of the complaint or aid it in any way.

Dower—Judgment Against Husband—Effect.

4. The lien of a judgment against a husband is subject to the interest of his wife, whether arising from a tenancy in common with her husband or out of her right of dower.

Foreclosure—Complaint—Adjustment of Equities.

5. Where the complaint in a mortgage foreclosure suit stated that defendants other than the mortgagors had or claimed interests in or liens on the premises, as judgment or attaching creditors, but that their interests or liens were subordinate to plaintiff's mortgage, and demanded that the priority of the mortgage lien be fixed and established, and that the liens of such other defendants be declared inferior to them, the court properly adjusted these equities in the decree.

Appeal from District Court, Jefferson County; Lew L. Callaway, Judge.

ACTION by Josephine Manuel, administratrix of Moses Manuel, deceased, against Dima S. A. Turner individually and as

administratrix of Davis C. Turner, deceased, and others. From the decree, defendant, Turner appeals. Modified and affirmed.

Messrs. Galen & Mettler, for Appellants.

The relief granted to the plaintiff if there be no answer cannot exceed that which he shall have demanded in his complaint. (Code Civ. Proc., sec. 1003; *Raun v. Reynolds*, 11 Cal. 19; *Gage v. Rogers*, 20 Cal. 91; *Lamping v. Hyatt*, 27 Cal. 102; *Gautier v. English*, 29 Cal. 165; *Parrott v. Den*, 34 Cal. 81.) When the prayer of the complaint is for specific relief, plaintiff is confined to a recovery in strict accordance with what he has asked for. (23 Cyc. 764, note 67, and cases cited; *Staacks v. Bell*, 125 Cal. 309, 57 Pac. 1012; *Mudge v. Steinhart*, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147.)

Messrs. Word & Word, for Respondent.

The provision of section 1003 of Code of Civil Procedure is a rule of procedure, and not a limitation on the jurisdiction of the court, and where the relief does go beyond that demanded in the complaint, as in cases where judgment is given for a greater sum than that asked for, the judgment is voidable and not void, and is not subject to collateral attack. (*Harrison v. Union Trust Co.*, 144 N. Y. 326, 331, 39 N. E. 353; *Chase v. Christianson*, 41 Cal. 256; *Bond v. Pacheco*, 30 Cal. 530; *Jones v. Jones*, 78 Wis. 446, 47 N. W. 728; *Mach v. Blanchard*, 15 S. Dak. 432, 91 Am. St. Rep. 698, 90 N. W. 1042, 58 L. R. A. 814.) Section 1291 of the same Code gives the court the right, if there be surplus money remaining after payment of the amount due on the mortgage, lien or encumbrance, with costs, to cause the same to be paid to the person entitled to it. This is but a declaration of the general rule of practice in courts of equity.

"It is proper and usual for the foreclosure decree to direct the manner in which the proceeds of sale shall be applied to the liens or charges on the property or apportioned among those entitled; but the omission of such a direction will not

necessarily invalidate it." (27 Cyc. 1645, citing *Taylor v. Ellenberger*, 134 Cal. 31, 66 Pac. 4; *Orange Bank v. Duncan*, 133 Cal. 254, 65 Pac. 469; *Bank of Ukiah v. Reed*, 131 Cal. 597, 63 Pac. 921; *California etc. Co. v. Miller*, 3 Cal. App. 54, 84 Pac. 453. See, also, Jones on Mortgages, sec. 1579; 9 Ency. of Pl. & Pr. 403; *Windt v. Gilleran*, 135 Cal. 94, 66 Pac. 970; *Hibernia Society v. London etc. Co.*, 138 Cal. 257, 71 Pac. 334; *Union Water Co. v. Murphy's Flat Co.*, 22 Cal. 620.) In view of the authorities cited, and the prevailing practice in courts of equity in cases of foreclosure of mortgages, the relief granted in the decree in directing the distribution of the surplus funds, arising from the sale of the mortgaged premises, to the persons entitled, is not in excess of that demanded in complaint so as to bring this case within the prohibition of section 1003, *supra*.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to obtain a decree foreclosing three several mortgages upon lands situate in Jefferson county and described in the complaint, which were executed by Davis C. Turner and his wife, Dima S. A. Turner, to various persons to secure the payment of as many promissory notes, each one bearing the same date as the one of the mortgages intended to secure it. At the time of his death the plaintiff's intestate was the owner of all of these notes and mortgages. The second and third of the mortgages cover the lands described in the first, as well as others, but the record is silent as to what were the several interests of these defendants in any of them. The date of the third, and the junior, mortgage, was January 21, 1903. The other two were executed some years prior to that date.

The complaint contains three separate counts, each one setting forth the allegations necessary to warrant foreclosure. George M. Bourquin and the T. C. Power Company were made defendants; it being alleged that they each claimed some interest in or lien upon the mortgaged property as judgment or at-

tachment creditors or otherwise, but that their interests were subject and subsequent to the liens of plaintiff's mortgages. The prayer demands the usual decree of foreclosure as against the Turners, husband and wife, that the priority of plaintiff's mortgage liens over those of George M. Bourquin and the T. C. Power Company be fixed and established, that the property be sold to satisfy plaintiff's mortgages, and that the plaintiff have such other and further relief as to the court may seem just and equitable.

The action was brought on March 6, 1906. After being served with summons, the Turners filed a general demurrer. This was on March 21st. On April 24th they entered into a stipulation with plaintiff, in which it was agreed that all the allegations of the complaint were true; that the Turners had no defense and would file no answer; that their demurrer might be overruled; that their default might be entered on or after July 11, 1906; and that at any time after that date judgment might be entered against them in accordance with the prayer of the complaint, unless the amounts due on the several promissory notes had been paid. Default was entered against them on July 13th, no payment having been made. In the meantime, on March 14th, the defendant Bourquin filed his answer, admitting the truth of the allegations of the complaint, and alleging that he was the owner of a judgment against Davis C. Turner which had been recovered on February 2, 1904, and was a lien upon the property described in the complaint. He asked that the surplus remaining after the satisfaction of plaintiff's mortgages be applied to the satisfaction of his judgment. The defendant T. C. Power Company filed its answer on April 18th. It is alleged that on October 16, 1902, it brought its action against Davis C. Turner in the district court of Lewis and Clark county; that it caused an attachment to be issued therein, directed to the sheriff of Jefferson county, and to be levied upon all the lands described in the complaint; that thereafter a judgment was given and made in said action in its favor for \$103.85; and that thereafter a transcript of said judgment was filed in

the office of the clerk of the district court of Jefferson county, and thus became a lien upon all of said lands from the date of the levy of the attachment, paramount to plaintiff's lien under said mortgages. The prayer demanded that upon final decree its lien be adjudged paramount to that of plaintiff, and that its judgment be first paid out of the proceeds of the sale of the property.

The allegations of Bourquin's answer were not controverted by anyone. To the answer of the T. C. Power Company the plaintiff filed a replication, in which, after putting in issue many of the material allegations thereof, it is alleged, "as separate defenses, cross-complaints, and counterclaims," (1) that on February 6, 1901, a judgment was duly given and made by the district court of Lewis and Clark county in favor of the Thomas Cruse Savings Bank, a corporation, against the defendant Davis C. Turner for \$610.05; that thereafter a transcript of this judgment was filed and docketed in the office of the clerk of the district court of Jefferson county; that said judgment thus became a lien upon the property described in the complaint; that thereafter Moses Manuel, plaintiff's intestate, became the owner thereof by assignment; that the same came into the hands of the plaintiff as his administratrix, and that it remains wholly unpaid; and (2) that on September 22, 1902, one Arthur J. Craven brought an action in the district court of Lewis and Clark county against Davis C. Turner and Dima S. A. Turner; that he caused an attachment to issue therein, directed to the sheriff of Jefferson county, and to be levied upon the interests of said defendants in the lands described in the complaint; that thereafter such proceedings were had in the cause that on November 8, 1902, judgment was duly given and made therein in favor of said Craven and against Davis C. Turner for \$302.50; that on November 10, 1902, a transcript of the judgment was duly filed and docketed in the office of the clerk of the district court of Jefferson county; that thereafter Moses Manuel, plaintiff's intestate, became the owner thereof by assignment by said Craven; that it came into the hands of plaintiff, as the adminis-

tratrix of said Manuel; that it was wholly unsatisfied; and that both judgments are liens upon the property described in the complaint paramount to the judgment lien of the T. C. Power Company. The prayer demands judgment in accordance with the prayer of the complaint.

The court found (1) that the mortgage set forth in the first count of the complaint was a first lien upon all the lands described therein; (2) that the one set forth in the second count was a second lien upon the same lands and a first lien upon the other lands described therein; (3) that the liens of the Cruse Savings Bank and the Craven judgments, and also of the T. C. Power Company judgment, followed next in the order in which they are here enumerated; (4) that plaintiff was entitled to have satisfaction of her third mortgage after the satisfaction of these judgments; and (5) that the lien of the Bourquin judgment should be satisfied out of any surplus thereafter remaining. A decree was entered directing the property to be sold, and the proceeds, after the payment of costs including attorney's fees for foreclosure, be applied to the satisfaction of the different liens in the order mentioned. Pending the action, Davis C. Turner died intestate, and Dima S. A. Turner, having qualified as his administratrix, was substituted as defendant in his stead. She has appealed from the decree both as administratrix and in her own right.

As heretofore stated, it does not appear what the respective interests of Davis C. Turner and Dima S. A. Turner were at the time the various mortgages were executed by them and the judgments against Turner were obtained. It is a matter of no importance, however, so far as it has to do with the contention made by the appellant. If it be assumed that she has only a dower interest, the decree is open to attack on some of the grounds which are urged against it by the appellant. As to the Turners, the decree was entered by default. Under the stipulation between the plaintiff and the Turners, it should have been entered in accordance with the prayer of the complaint. This should have been done in any event, for the statute applicable

(Code Civ. Proc., sec. 1003) declares: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." Now, the complaint neither in its allegations nor in the prayer contains any reference to plaintiff's two judgments. For this reason the court could grant no relief with reference to them, and so far as it did undertake to do so, the decree is beyond the purview of the demand made in the complaint, and is, to this extent, erroneous. Nor is it aided in the least by the fact that the Turners stipulated for its entry. Plaintiff was bound by the stipulation, and could not demand anything further than was contemplated by its terms. Indeed, judging from the terms in which it is couched, the parties seem to have had in mind the provisions of the statute. In any event, the decree could go no further, in the extent of the relief granted, than the stipulation provided. Again, these judgments make their appearance in the case in plaintiff's replication to the answer of the defendant T. C. Power Company. This being so, they could not be made the basis of relief against the Turners; for the replication cannot be looked to to broaden the scope of the complaint or aid it in any way. Nor can a judgment for plaintiff for affirmative relief be supported upon allegations which appear in the reply only. (*Thornton v. Kaufman*, 35 Mont. 181, 88 Pac. 796; 6 Ency. of Pl. & Pr. 461.) Further, the defendants could not anticipate that any issue would arise in the case between the plaintiff and the T. C. Power Company as to these judgments, which would in any way affect their rights, or that they would be brought into the case at all. Much less could they have anticipated that their validity as liens against the interest of Dima S. A. Turner would be declared in the decree. If she had the title to the land they were not liens at all. If her interest was only her right of dower, still they could not be declared valid liens against the property so as to defeat this right; for, though, so far as the mortgages were concerned, she had waived her

right of dower, the lien of any judgment against her husband was subject to her claim in the surplus remaining after the mortgages had been satisfied. (*Dahlman v. Dahlman*, 28 Mont. 373, 72 Pac. 748; Civ. Code, sec. 228.) In its consideration of the case the court should have eliminated those judgments altogether.

The decree is erroneous, also, in directing the satisfaction of the T. C. Power Company judgment out of the proceeds of the sale, without regard to the interest of the wife. While the decree correctly declared the lien of this judgment superior to the lien of the third mortgage, it could in no event attach as such except to the interest of the husband. It did not attach to the interest of the wife, whether such interest arose out of the ownership of the whole property by her or a tenancy in common with her husband, or out of her right of dower. The same may be said of the lien of the Bourquin judgment upon the surplus remaining after all the other liens were satisfied. His judgment being against Davis C. Turner alone, he had a lien upon his interest only.

It is said by counsel for appellant that since these latter judgments appear in the case, not from allegations in the complaint, but in the answers of Bourquin and the T. C. Power Company, the decree is erroneous in declaring their status. In this contention, however, we think there is no merit. The complaint states in terms that these defendants have or claim interests in or liens upon the premises described in the mortgages or some part thereof, as judgment or attachment creditors, but that their respective interests or liens are subsequent and subordinate to the liens of plaintiff's mortgages. The prayer demands that the priority of the plaintiff's mortgage liens be fixed and established, and that the liens of these defendants be declared inferior to them. It is apparent, therefore, that under the statute and the stipulation of the defendants for judgment it was fairly within the contemplation of the parties that the rights as between the plaintiff and these defendants should be adjusted in the decree. The court was therefore authorized to adjust these equities and

decree accordingly. In this respect the decree is not open to attack.

For the reasons heretofore stated, however, the cause is remanded to the district court with directions to amend the decree by eliminating therefrom any mention of the judgments belonging to the plaintiff, and, further, to so modify it as to make the T. C. Power Company and the Bourquin judgments liens upon the interest of Davis C. Turner only, whatever that interest may be. When so amended and modified, the decree will stand affirmed.

Modified and affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

STEVENS, APPELLANT, v. TRAFTON, RESPONDENT.

(No. 2,501.)

(Submitted February 6, 1908. Decided February 13, 1908.)

[93 Pac. 810.]

Specific Performance — Judicial Discretion — Nonsuit — Evidence—Equity Cases—Appeal—Practice.

Specific Performance—Nonsuit—Judicial Discretion.

1. The discretion with which the district court is vested in determining whether or not a contract should be specifically enforced is a sound legal one; therefore, where the testimony of plaintiff in such a suit furnished no ground for different conclusions, but showed that plaintiff was entitled to the relief asked, no grounds for the exercise of judicial discretion existed, and the motion of defendant for a "nonsuit" should have been overruled.

Equity Cases—"Nonsuit."

2. In equitable proceedings there can be, strictly speaking, no such thing as a motion for a nonsuit.

Nonsuit—Effect in Law Actions—Appeal.

3. The effect of granting a nonsuit in an action at law is to declare that the evidence is insufficient to warrant a verdict for plaintiff under any circumstances; hence the judgment should be reversed on appeal, if there was any evidence justifying a verdict for plaintiff.

Same—Equity Cases—Discretion—Appeal.

4. In an action for specific performance of a contract, if plaintiff is not entitled to relief as of right, then upon a motion for nonsuit at the close of plaintiff's testimony it is the trial court's duty to adjudicate the issues between the parties, and the court may exercise a legal discretion in giving or withholding relief; hence the effect of nonsuit would not be to determine that plaintiff was not entitled to relief in any view of the evidence, but that the court, in the exercise of its discretion, withheld relief in that particular case, and its action will not be disturbed on appeal unless there was an abuse of discretion.

Specific Performance—Oral Agreement—Performance.

5. Where it appeared from plaintiff's evidence in a suit to enforce specific performance of an oral contract to sell real property, that he had fully performed all the terms of the agreement to be performed by him, and that defendant had put him in actual possession of the premises upon which he had erected substantial improvements, the court had the power, under section 2342 of the Civil Code, to grant the relief asked for.

Same—Evidence—Review—Nonsuit.

6. Evidence of plaintiff in a suit to enforce the specific performance of an oral agreement for the sale of a lot, reviewed, and held sufficient to entitle plaintiff to a decree, and that the court erred in granting a "nonsuit."

Same—Nonsuit.

7. The fact that plaintiff in the suit referred to in the foregoing paragraph produced two receipts, which by their recitals, "balance in six months" and "part payment on lot," injected the only element of uncertainty into plaintiff's case, did not warrant a court of equity in disregarding his positive testimony as to his full performance of the agreement and granting a "nonsuit," especially in view of the failure of counsel to ask plaintiff for an explanation in this regard.

Same.

8. The court in passing upon the motion for "nonsuit" in the above case should have taken into consideration defendant's general denial which gave it no intimation of the nature of the defense relied upon, and which may have had concealed within it either a valid defense or an absolutely unconscionable one, and should, in view of plaintiff's positive testimony that he had fully performed his part of the agreement, have denied the motion.

Equity Cases—Appeal—Final Disposition—Practice.

9. Since the evident purpose of the Act of 1903 (Laws 1903, 2d Extra Session, p. 7), requiring the supreme court to determine all questions of fact as well as of law in equity cases, unless for good cause a new trial or the taking of further testimony be ordered, is to expedite the entry of final judgment in such cases, and thus put an end to litigation, it is the duty of the parties to introduce all their testimony in the trial court, in order to enable the appellate tribunal to carry out the intention of the Act.

Same.

10. On appeal in equity cases, defendant's motion for judgment at the conclusion of plaintiff's case will be construed as a declaration that, in case his motion is granted, he elects to stand upon the case made by plaintiff, and final judgment on appeal will be entered accordingly, and new trials in such cases will not be ordered except for good cause shown in the record.

Appeal from District Court, Valley County; John W. Tattan, Judge.

ACTION by C. H. Stevens against R. M. Trafton for specific performance of an oral agreement to convey land. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Mr. T. E. Crutcher, for Appellant.

Courts of equity have always claimed and exercised the right to enforce specific performance of contracts of this class, where they have been wholly or partially performed by the party seeking relief. (3 Pomeroy's Equity Jurisprudence, 1409.) This doctrine is distinctly recognized by our Code (Civ. Code, sec. 2342) and by this court. (*Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007.)

A writing acknowledging the payment of a certain sum of money as part payment for the purchase price of land described therein, and reciting that the person from whom it is received shall have a designated time within which to pay a further specified sum which shall constitute the balance of the purchase price, is a contract to convey. (*Ellis v. Bryant*, 120 Ga. 890, 48 S. E. 352.)

"Where the signature of a party is made by another, at the party's request and in his presence, the authority to make such signature need not be given in writing, for the act of signing is the act of the party and not of an agent." (8 Am. & Eng. Ency. of Law, 1st ed., p. 665, citing *Irvin v. Thompson*, 4 Bibb. (Ky.) 295; *Frost v. Deering*, 21 Me. 156; *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Pierce v. Hakes*, 23 Pa. St. 242.)

Messrs. Hurd & Lewis, for Respondent.

Whether specific performance of a contract to purchase land will be compelled in the particular case depends upon the circumstances, and the relief will be granted or withheld in the

discretion of the court. (*Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007; *Sturgis v. Galindo*, 59 Cal. 28, 43 Am. Rep. 239; *Reid v. Mix*, 63 Kan. 745, 66 Pac. 1021, 55 L. R. A. 706; 20 Ency. of Pl. & Pr. 390, and cases cited; 26 Am. & Eng. Ency. of Law, 2d ed., 62, and cases cited.) Specific performance of a contract is never demandable as a matter of absolute right. (*Kelly v. Central Pac. Ry. Co.*, 74 Cal. 557, 5 Am. St. Rep. 470, 16 Pac. 386; *Ratterman v. Campbell*, 26 Ky. Law Rep. 173, 80 S. W. 1155; *Thornburgh v. Fish*, 11 Mont. 53, 27 Pac. 381; *Davenport v. Latimer*, 53 S. C. 565, 31 S. E. 630; *Mack v. McIntosh*, 181 Ill. 633, 54 N. E. 1019; *Boldt v. Early*, 33 Ind. App. 434, 104 Am. St. Rep. 255, 70 N. E. 271.) A court of equity will refuse specific performance and turn the party over to his remedy at law, if it appears to the court to be inequitable to grant such relief. (26 Am. & Eng. Ency. of Law, 2d ed., 62, and cases cited; *Rathbone v. Groh*, 137 Mich. 373, 100 N. W. 588.)

To authorize a court to exercise equitable jurisdiction compelling the specific performance of a contract, the contract must be reasonably certain as to its subject matter, its stipulations, its purpose and its parties, and the circumstances under which it was made. (*Largey v. Leggatt*, 30 Mont. 148, 75 Pac. 950; *Cella v. Brown*, 144 Fed. 742; 26 Am. & Eng. Ency. of Law, 2d ed., p. 32, and cases cited; 4 Am. & Eng. Ency. of Law, 2d ed., Supp. 862, note 5 and cases cited.) The terms of the contract must be established by proof clearly, definitely and unequivocally, or specific relief will be refused. (*Cella v. Brown*, *supra*; *Wharton v. Stoughtenburgh*, 35 N. J. Eq. 274.) And where a bill is ambiguous, its averments will be taken most strongly against the complainant. (20 Ency. of Pl. & Pr. 436, and cases cited.) It nowhere appears either from the complaint, answer or the proof, that the respondent was ever at any time in a position specifically to perform the alleged contract. Nor does it appear that the consideration alleged in the complaint was fair, adequate and equitable. Such allegations are necessary. (*Traphagen v. Kirk*, 30 Mont. 562, 77 Pac. 58.)

MR. JUSTICE SMITH delivered the opinion of the court.

In the district court of Valley county the plaintiff filed his complaint, wherein he alleged:

“(1) That on the 21st day of July, 1903, he made a certain agreement with defendant whereby defendant agreed to sell, and the plaintiff agreed to buy of defendant, the east half of lot 3 in block 6 of the Trafton addition to Malta, in the county of Valley, state of Montana, for which he agreed to pay defendant the sum of \$100, and at the same time plaintiff agreed to buy from defendant certain lumber which he would need for building a house on said lot. By the terms of said agreement plaintiff was to pay defendant \$50 cash, \$50 in three months, and the balance, whatever it might be, in six months, which included the price of the lumber to be purchased, and when these payments were made defendant agreed to make to plaintiff a warranty deed to said east half of said lot.

“(2) That in pursuance of said agreement plaintiff paid defendant \$50 cash on said 21st day of July, 1903, and was placed in possession of said east half of said lot by defendant, and proceeded to and did buy lumber from defendant and erected a house on said east half of said lot. That on the 20th day of October, 1903, he paid defendant the sum of \$50 in accordance with the terms of said agreement, and on the 31st day of October, 1904, he paid defendant the sum of \$101.78, the balance due under the terms of said agreement, and thus complied fully with his part of the agreement.

“(3) That on the 31st day of October, 1904, plaintiff made a written demand on said defendant to make and execute to him a warranty deed to said east half of said lot, which said deed defendant refused and still refuses to make, execute, and deliver to this plaintiff, notwithstanding plaintiff has performed all his part of said agreement.

“Wherefore he prays judgment that said defendant be decreed and compelled to make, execute, and deliver to this plaintiff in a reasonable time, to be fixed by the court, a warranty

deed to the east half of lot 3 in block 6 of Trafton's addition to Malta, and that this honorable court appoint a commissioner to make such conveyance in default of one being made by defendant in the time fixed by the court, and for his costs herein."

Defendant filed a general demurrer to the complaint, but afterward withdrew the same and filed an answer, wherein he denied each and every allegation thereof.

Plaintiff was the only witness in his own behalf. After testifying to the contract for the sale of the lot, as alleged in his complaint, he continued as follows: "Mr. Trafton paced the lot off, indicating the northeast and northwest corners, scratching in the dirt, and said: 'This is the parcel.' We then went to the bank, and I paid him \$50 cash. He called in Mr. Smith from another part of the bank, and said, 'Smith, Stevens has purchased the east half of this lot,' putting his finger down on the plat which he held in his hand. 'Mark it sold. He is to pay \$100. The conditions are that he is to pay \$50 down, and \$50 in three months. You take the money and give him a receipt.' Mr. Trafton then withdrew, and Mr. Smith went into another part of the bank, and came back and gave me a receipt, reading as follows:

" 'Malta, Montana, July 21, 1903.

" 'Received of C. H. Stevens, the sum of fifty dollars (\$50.00) being part payment on the east half of lot 3, block 6, of Trafton's addition to Malta, Montana, another fifty dollars (\$50.00) to be paid in three months, and the balance in six months, at which time a warranty deed is to be given the said Stevens.

" 'R. M. TRAFTON, per SMITH.'

"I paid the second \$50 on October 20, 1903. I have the receipt signed by E. Smith, as follows:

" '\$50.00.

"October 20, 1903.

" 'Received of C. H. Smith fifty dollars, part payment on lot.

" 'E. SMITH.'

"I offered to pay the money to Mr. Trafton, but he sent me to Smith. I made this payment to Mr. Smith by direction of Mr. Trafton. Mr. Trafton told me to go and pay Smith. * * * He said to pay it to Smith, which I did, and took a receipt. * * * After having paid everything, I made a demand on Mr. Trafton for a deed in person, and by registered letter. I was at his store, and I told him I wanted a deed to this lot that I had contracted for, the east half of lot 3, block 6. He said: 'You will get your deed when you pay for it.' I said: 'Everything is paid for.' Then he said: 'Who did you pay?' I said, 'I paid Smith.' He said: 'Go to Smith for your deed.' I went to Smith, and he sent me back to Trafton, and then I served written notice, through the postoffice, on Mr. Trafton, demanding a warranty deed for the property. I never received any reply to that written notice. Smith is out of the country, and has been for a long time. I paid for the lot in full according to Mr. Trafton's directions. I put a frame building, 12x18 feet, 10 feet high, on the lot. I have remained in possession ever since I purchased the lot, and I am in possession now. The contract I had with Mr. Trafton was a verbal contract. * * * I have no written agreement concerning this lot. * * * My recollection is clear as to the terms of this oral agreement. * * * As Mr. Trafton went out of the bank he said: 'So far as the lumber is concerned, you can pay that at the bank.' * * * I handed the \$50 to Trafton, and he passed it on to Smith. * * * The next conversation I had as to title on payment was on the 20th of October, 1903, when I started from the office which I had built on the lot down to his store to pay him the remaining \$50, and I met him on the street and I told him I was going down to pay him the other \$50 on my lot. He said: 'I am busy. Go in and pay Smith.' He went on, and I went in and paid it to Smith. * * * Then it ran along until the day I paid my lumber bill, which was the 31st day of October, 1904. The reason why I didn't demand a deed when I paid the \$50 in 1903 was because I had a lumber bill for about \$90 on that lot, due to Trafton, and I hadn't any

idea that he would give me a deed until I had paid it. I did not ask him at that time, or make any demand. I waited for about a year before I made a demand. I saw Trafton off and on about every day during that time. On the 31st day of October, 1904, I did make a demand on Mr. Trafton, and he told me to go to Smith for the deed. I went to Smith, and I did not get my deed. Mr. Smith simply grinned and said: 'You better go back to Trafton.' I did not go back to Trafton, but wrote out a demand on him and sent it by registered letter. That demand reads as follows:

" 'Malta, Montana, October 31, 1904.

" 'R. M. Trafton, City.

" 'Sir: I hereby demand of you a warranty deed to the east half of lot 3, block 6, Trafton's addition to Malta, as per our agreement of July 21, 1903, and if the same is not delivered within six days from date, I shall begin proceedings against you to recover the same, and such damages as the law allows.

" 'C. H. STEVENS.' "

The record recites that at the conclusion of this testimony "the defendant moved for a nonsuit, upon the ground that, under the proof, no decree for specific performance could be awarded." The district court granted the motion, entered a judgment for the defendant, and plaintiff appeals therefrom.

Appellant contends that the court erred in granting the so-called motion for a nonsuit, for the reason that the testimony tended to prove all the material allegations of the complaint. The respondent, on the other hand, argues that specific performance of a contract is never demandable as a matter of right, but relief should be granted or withheld in the discretion of the trial court, and in this case the court below having withheld relief to plaintiff on his own showing, and the evidence furnishing grounds for different inferences, the finding of the lower court thereon should not be disturbed.

It is well settled that whether or not a contract will be specifically enforced is a matter of judicial discretion. (26 Am. & Eng. Ency. of Law, 2d ed., 62.) But it must be a sound

legal discretion. (*Dewey v. Spring Valley Land Co.*, 98 Wis. 83, 73 N. W. 565.) And assuming that the respondent is correct in his conclusion, we think he is wrong in his premises. As we read the testimony, it furnishes no reasonable grounds for different conclusions, and therefore no grounds for the exercise of discretion. Plaintiff testified that the purchase price of the lot was \$100, all of which had been paid. Had no written receipts been received in evidence, plaintiff's case would have embodied no uncertainty whatever. The parties, the subject-matter, the terms of and circumstances surrounding the making of the contract were all clearly and definitely stated. According to the evidence given by the plaintiff, the terms of the agreement were not merely partly, but fully performed on his part, and, in addition to that, the defendant had put the plaintiff into actual possession of the premises, upon which he had erected substantial improvements. Under these circumstances the court had the power to decree specific performance of the contract, by virtue of section 2342 of the Civil Code, which reads as follows:

"Sec. 2342. No agreement for the sale of real property, or of any interest therein, is valid unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or his agent, thereunto authorized, in writing; but this does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof." (See, also, *Wolke v. Fleming*, 103 Ind. 105, 53 Am. Rep. 495, 2 N. E. 325.)

But it is argued that because the two receipts produced by the plaintiff recite, respectively, "and the balance in six months, at which time a warranty deed is to be given," and "part payment on lot," an element of uncertainty was injected into the case that authorized the court in disregarding the positive oral testimony of the plaintiff. But let us remember that the plaintiff testified that there was also a lumber bill between the parties, that the sale of the lot and agreement to purchase lumber were parts of one transaction, and that defendant had instructed

him to pay the lumber money into the bank, as well as the \$50 remaining due on the lot. It is true that plaintiff did not attempt to explain the reason for this phraseology of the receipts, or to account for the employment of the words quoted. Singularly enough, he was not asked to do so by counsel for either party. But we do not think that this fact alone would warrant a court of equity in disregarding his positive testimony as to the terms of the sale. We feel that in equity and in good conscience he was entitled to a decree as prayed for upon the showing made by him.

The general denial made by the defendant gave the court no intimation of the nature of the defense. It is true that defendant was entitled to file such a pleading, but whether it concealed a valid defense or an absolutely unconscionable one the court had no way of knowing. The receipts were written by the defendant's agent. We think the court should have taken these matters into consideration in passing upon defendant's motion, especially in view of the fact that, unless the defendant can be compelled in this action to disclose his version of the agreement, the plaintiff may never be able to perform his part, although there may be but a small sum between them. We cannot say that time was of the essence of this agreement. (Civ. Code, secs. 2223, 2027.)

The difficulty we encounter in this case relates to the disposition we shall make of it upon reversal of the judgment. Strictly speaking, there is, in our present practice, no such thing as a motion for a nonsuit in an equitable proceeding. The effect of granting a nonsuit in an action at law is to declare, on the part of the court, that the evidence is not sufficient in law to warrant the jury in finding, under any circumstances, a verdict for the plaintiff. If it be true that in an action to enforce specific performance of a contract the plaintiff is not entitled to relief as of right, then upon a motion for a nonsuit, such as was interposed in this case, it becomes the duty of the trial court to adjudicate the issues between the parties, and in so doing the court may exercise a legal discretion in giving or withholding

relief. Such being the case, the effect of the nonsuit would not be to determine that the plaintiff was not entitled to relief in any view of the evidence, but that the court in the exercise of its discretion had withheld relief in the particular case. In the one case the action of the trial court would be reversed if there was any evidence justifying a verdict for the plaintiff, and in the other the action of the court would not be disturbed unless there was an abuse of discretion.

The legislature of 1903 (Laws 1903 [2d Extra. Sess.], p. 7) enacted into law the following practice provision:

"The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. * * * In equity cases, and in matters and proceedings of an equitable nature, the supreme court shall review all questions of fact arising upon the evidence presented in the record, whether the same be presented by specifications of particulars in which the evidence is alleged to be insufficient or not, and determine the same, as well as questions of law, unless for good cause, a new trial or the taking of further evidence in the court below be ordered."

The legislature has power by regulations to establish the procedure in civil and criminal cases, so far as such procedure does not amount to a denial of justice, and has power to declare by law what shall be the practice on appeal. (*Jordan v. Andrus*, 26 Mont. 37, 91 Am. St. Rep. 396, 66 Pac. 502.) The evident purpose of the legislature in passing the law above quoted was undoubtedly to expedite the entry of final judgment in cases where the parties were not entitled to trial by jury; to put an end to litigation and avoid the necessity of new trials involving expense and the contingencies incident to delay. These regulations seem reasonable and salutary. To the end, therefore, that this court might enter final judgment in these equity causes, it is provided that the court shall, on appeal, determine the same on the merits, unless for good cause a new trial or the taking of further evidence is ordered.

It is the duty of parties to an action in equity to introduce all of their testimony so that this court may carry out the intent of the legislature. If the defendant moves for judgment, at the conclusion of plaintiff's testimony, it will be construed hereafter as a declaration on his part that, if his motion be granted, he elects to stand upon the case presented by the plaintiff. In this case the defendant may perhaps have been misled by the practice heretofore pursued, into thinking that in the event of reversal he would get a new trial as of right. We feel, therefore, that in this particular case, that may be sufficient cause for ordering a new trial. But in future we shall not grant new trials in equity cases, except for good cause appearing in the record.

The judgment of the court below is reversed, and the cause remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

STATE, RESPONDENT, v. DE LEA, APPELLANT.

(No. 2,490.)

(Submitted February 5, 1908. Decided February 13, 1908.)

[93 Pac. 814.]

Criminal Law—Arraignment—Minutes of Court—Irregularities—Waiver—Reasonable Doubt—Definition—Instructions—Singling out Witness—Credibility of Defendant.

Criminal Law—Arraignment—Irregularities—Waiver.

1. The minutes of the trial of a criminal cause failed to show that the copy of the information delivered to defendant contained the names of the witnesses for the state. They did show that he asked for and obtained time to plead and afterward, without objection, pleaded to the information. *Held*, that by pleading without objection he waived the defect in the arraignment.

Same—Verdict—Jury—Calling of Names.

2. The purpose of section 2142, Penal Code, providing that the names of the jurors must be called by the clerk when their verdict is delivered, is to insure their presence before the verdict is delivered.

36	531
140	134

Same—Irregularities—Harmless Error.

3. Where the record in a criminal cause did not show that the jurors were not all present when the verdict was delivered, and from the minutes no other fair inference could be drawn than that they were actually present at the time, the omission from the minutes of a statement that their names were called prior to delivery of the verdict was not an error which prejudiced defendant in his substantial rights, and the irregularity may be disregarded under the provisions of sections 2320 and 2600 of the Penal Code.

Same—Verdict—Presence of Defendant—Minutes.

4. While under section 2142, Penal Code, the fact that the defendant in a criminal cause was present when the verdict was received must affirmatively appear, minutes which show his presence during the trial up to the time the jury retired, and then recite that "defendant thereupon waived the polling of the jury" and "defendant thereupon waives time for sentence and elects to be sentenced at this time," sufficiently meet this requirement.

Same—Reasonable Doubt—Instructions.

5. An instruction defining the term "reasonable doubt" in the language employed for that purpose in *Territory v. McAndrews*, 3 Mont., at page 162, and there approved and since accepted as a proper definition of those words, is not open to the objection that by it the jury were confined to a consideration of the evidence, whereas a reasonable doubt might arise from the lack of evidence.

Same—Instructions—Credibility of Defendant.

6. While it is the general rule that a court ought not in its instructions single out a particular witness and direct the attention of the jury to his testimony, section 2442, Penal Code, makes an exception to this rule, and the court may properly instruct that the jury, in judging the credibility of one on trial for a crime and the weight to be given to his testimony, may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he stands charged.

Same—Larceny—Definition—Curing Error.

7. The defect in an instruction which incorrectly defined "larceny" was cured by a subsequent one, which, though not technically correct, was not open to the objection urged against it by appellant.

Instructions—Review.

8. In reviewing instructions they must be considered as a whole.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

FRANK DE LEA was convicted of grand larceny, and appeals from the judgment of conviction. Affirmed.

Messrs. Maury & Hogevoil, and Messrs. Donovan & Melzner, for Appellant.

Mr. Albert J. Galen, Attorney General, and Mr. W. H. Poorman, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Frank De Lea was convicted of the crime of grand larceny and appeals from the judgment.

1. Objections are made to the proceedings in the case. It is said the court erred:

“(a) In not causing a copy of the indorsements upon the information, including the list of witnesses, to be delivered to the defendant at the time of his arraignment.

“(b) In permitting the verdict to be filed without having the names of the jurors first called by the clerk.

“(c) In receiving the verdict in the absence of the defendant.” These objections must be answered, if at all, by the record.

(a) The minutes of the trial court show: “This day, September 22d, defendant being present in person and by counsel, Mr. J. G. Brown, whose name is by the court ordered entered as counsel for defendant, and the county attorney being present on the part of the state, being then asked, defendant states that his true name is Frank De Lea as charged in the information. Defendant waives reading of the information and accepted a copy thereof, on application of Mr. J. G. Brown. Saturday, September 29th, 1906, at 10 o'clock A. M. is by the court fixed as date for the entry of a plea herein. * * * (September 29th.) This day defendant being present in person and by counsel Mr. J. G. Brown, and the county attorney being present on the part of the state, thereupon defendant pleads not guilty to the offense charged in the information, which plea is by the court ordered entered.”

It is not contended that the original information does not contain the names of the witnesses for the state; but it is contended that the minutes fail to show that the copy delivered to the defendant contained the necessary indorsements. It would appear from section 1893, Penal Code, that the indorsements on the information are not considered part of the information;

but, however this may be, by asking for and obtaining time to plead, and afterward, without objecting, pleading to the information, the defendant waived these defects in the arraignment. (12 Cyc. 348; *People v. Lightner*, 49 Cal. 226.)

(b) The next contention is that the minutes fail to show that the names of the jurors were called before the verdict was delivered, as required by section 2142, Penal Code. The minutes do show the presence of the twelve men constituting the jury while the case was being tried. With respect to what occurred after the case was submitted the minutes recite: "The jury retired in charge of a sworn bailiff to consider of their verdict and later returned into open court and submitted their verdict which is in words and figures as follows, to-wit: [Title of Court and Cause.] 'We, the jury in the above-entitled action, find the defendant Frank De Lea guilty of the crime of grand larceny and leave his punishment to be fixed by the court. M. L. Mustard, Foreman.' Which verdict was filed and read in open court and in the presence of the jury who on being asked state that such is their verdict." While these minutes do not meet the requirements of the Code, we hardly think any other fair inference can be drawn than that the jurors were, in fact, all present. Certainly there is not anything here to suggest that the jurors were not all present; and the evident purpose of the provision of section 2142 above for calling the names of the jurors is to insure their presence before the verdict is delivered. A case presenting precisely this same question, and under a similar statute, is *Norton v. State*, 106 Ind. 163, 6 N. E. 126. In the opinion in that case it is said:

"Under the alleged error of the court in overruling appellant's motion for a *venire de novo*, the only point made by his counsel is based upon their construction of the provisions of section 1829, Revised Statutes of 1881, and the alleged non-compliance of the trial court therewith. This section provides as follows: 'When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and, if all appear,

their verdict must be rendered in open court. If all do not appear, the rest must be discharged without giving a verdict, and the cause must be tried again at the same or next term. The defendant shall have the right, in all criminal cases, to have the jury polled.' It is not claimed by appellant that the jury had not all appeared when their verdict herein was rendered in open court; but it is claimed that their names were not called prior to such rendition of their verdict. Although the statutory provision requiring that the names of the jury must be called is mandatory in form, and although we think that such provisions ought always to be strictly complied with, yet we can hardly regard the omission to call the names of the jury as a material or fatal error, unless it further appears that the jury did not, in fact, all appear at the time their verdict was rendered in open court. To such an error, conceding it to be such, as the one here complained of, section 1891, Revised Statutes of 1881, seems to us peculiarly applicable, so far as our consideration of the error is concerned. In that section it is thus provided: 'In the consideration of the questions which are presented upon an appeal, the supreme court shall not regard technical errors or defects, or exceptions to any decision or action of the court below, which did not, in the opinion of the supreme court, prejudice the substantial rights of the defendant.' In the case at bar, if the jury all appeared at the time their verdict was returned into open court, as we must assume they did, in the absence of any showing to the contrary, then we are of opinion that the omission of the court to have the names of the jury called, even if erroneous, did not prejudice the substantial rights of the appellant."

Another case identical in its facts is *People v. Rodundo*, 44 Cal. 538, in which it is said: "It is now claimed that the court erred in receiving the verdict without first calling the names of the jurors. The statute provides that, when the jury have agreed upon a verdict, they shall be conducted into court. 'Their names must then be called, and, if all do not appear, the rest shall be discharged without giving a verdict.' (Crim. Prac.

Act, sec. 414.) Undoubtedly it was an irregularity to receive the verdict without first calling the names of the jurors; but, if all were in fact present and declared the verdict, it was an irregularity which in no way prejudiced the defendant. Section 601 of the Criminal Practice Act provides: 'Neither a departure from the form or mode prescribed by this Act in respect to any pleadings or proceedings, nor an error or mistake therein shall render the same invalid unless it have actually prejudiced the defendant or tended to his prejudice in respect to a substantial right.' The record shows that the 'jury' returned into court and reported the verdict, and it is not even suggested by counsel that the jurors were not all present and agreed. * * * On the whole, we see no error in the case which prejudiced the defendant in respect to any substantial right, and the judgment is therefore affirmed." Our Penal Code contains provisions similar to those referred to by the Indiana and California courts. (See Pen. Code, secs. 2320, 2600.)

(c) The third contention is, that the minutes do not show that the defendant was present when the verdict was returned. The minutes do show the presence of the defendant during the trial up to the time the jury retired to consider of their verdict. Then, after the recital last above set forth, the minutes proceed: "Defendant thereupon waived the polling of the jury. * * * Defendant thereupon waives time for sentence and elects to be sentenced at this time." The word "thereupon" first used in this quotation is significant in this connection. Webster defines it to mean: "Upon that or this; immediately, at once; without delay." Substituting in the minutes, then, the meaning of the word "thereupon" for the word itself, and the minutes would say, that the jury returned into open court and submitted their verdict, which verdict was filed and read in open court and in the presence of the jury, who, on being asked, stated that such was their verdict. Upon this happening, the defendant immediately waived the polling of the jury and asked to be sentenced at this time.

The Penal Code, section 2141, provides that the defendant, if charged with a felony, must be present when the verdict is received; and it is generally held, and we think correctly, that this fact must affirmatively appear. But it must be conceded that by every fair intendment this record is a sufficient showing of the defendant's presence when the verdict was received. Just criticism may be made of the manner in which the minutes of this trial were kept. A studied effort to ignore the law could hardly have been productive of a more defective record.

2. Exception is taken to the giving of instruction No. 7, which defines a reasonable doubt in the language employed for that purpose in *Territory v. McAndrews*, 3 Mont. 158. The particular objection is, that the jury was confined to a consideration of the evidence, whereas, it is said, a reasonable doubt may arise from the lack of evidence; and *State v. Harrison*, 23 Mont. 79, 57 Pac. 647, *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481, *Brown v. State*, 105 Ind. 385, 5 N. E. 900, *State of North Carolina v. Gosnell*, 74 Fed. 734, *Smith v. State*, 9 Tex. App. 150, *Densmore v. State*, 67 Ind. 306, 33 Am. Rep. 96, and *Knight v. State*, 74 Miss. 140, 20 South. 860, are cited in support of this contention. But most of these cases are not in point.

In the *Harrison Case* this particular instruction now under consideration was approved. The case was reversed for the refusal of the trial court to give an instruction upon the subject of the presumption of innocence. While in the case now before us there does not appear to have been any instruction given upon the presumption of innocence, as there ought to have been, there is not any error assigned upon the failure of the court in this respect. Indeed, the record shows that an instruction upon that subject was not requested; but in the *Harrison Case* it was, and was refused. So that our consideration of instruction No. 7 is uninfluenced by the failure of the court to give an instruction upon that very important branch of the case.

In the *Coffin Case* there was a reversal for the same reason as in the *Harrison Case*.

In the *Gosnell Case* the subject is not treated at all.

In *Brown v. State* a somewhat similar instruction is criticised, but the judgment of conviction was affirmed. The same thing occurred in *Mackey v. People*, 2 Colo. 13.

In *Smith v. State* the instruction given was held erroneous, but upon entirely different grounds from that suggested by counsel for appellant in this case. In each of the other two cases cited, an instruction of this general character was held erroneous, for the reason now urged here. But so far as we are able to ascertain, Indiana and Mississippi are the only states in which the giving of an instruction of this general character is held to be error.

It is the accepted rule that, before anyone can be convicted of a criminal offense, his guilt must be established beyond a reasonable doubt; but every attempt to define the apparently simple phrase "a reasonable doubt" has been attended with the greatest difficulty, and it may fairly be said that in a great majority of instances the definitions do not convey any more accurate idea than the phrase itself. So great is the difficulty, that some courts hold that it is not error for the trial court to decline any attempt at a definition. (12 Cyc. 623.)

In *United States v. Hopkins*, 26 Fed. 443, Judge Dick said: "The inherent imperfection of language renders it impossible to define in exact express terms the nature of a reasonable doubt. It arises from a mental operation, and exists in the mind when the judgment is not fully satisfied as to the truth of a criminal charge, or the occurrence of a particular event, or the existence of a thing."

However, in 1850, Chief Justice Shaw, of the supreme court of Massachusetts, in the celebrated case of *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711, formulated a definition which for more than half a century has withstood most of the criticism, and has been adopted and followed in a very large number of courts. In substance, if not in form literally, that definition was adopted and approved by this court in *Territory v. McAndrews*, above, and for more than thirty years the

instruction approved in that case has been generally accepted and approved by the courts of this jurisdiction and repeatedly approved by this court. (See *State v. Martin*, 29 Mont. 273, 74 Pac. 725.) So far as we are aware, the present is the first instance in which the instruction has been attacked upon the ground now urged.

We think, however, that the criticism made of this instruction, by the courts above, is altogether captious, and must have had its origin in the misconception of the function of the presumption of innocence. By some of the courts it is held that this presumption is evidence introduced by the law in favor of the accused. But in *State v. Martin*, above, this court in a very able opinion by Mr. Commissioner Poorman, said: "This presumption may have the effect of evidence, in that it must be overcome by evidence; but, strictly speaking, it cannot be evidence, nor can it be introduced in the case, for it is in the case from its inception. It needs no introduction. It is the safeguard which the law casts around all persons accused of crime, and the defendant cannot be reached by a verdict of guilty until this safeguard is entirely removed. This removal can only be accomplished by evidence which satisfies the minds of the jurors beyond a reasonable doubt. The presumption of innocence is in effect the very thing against which the prosecution is directed."

This presumption of innocence surrounds every person accused of crime. And to say that this presumption is evidence introduced at the trial in behalf of the accused, implies, at least, that such person does not have that same presumption attending him prior to the trial—for instance, from the time of his arrest until the trial. The expression, "the presumption of innocence is evidence introduced by the law in favor of the accused," is inaccurate and an unfortunate one. If, however, this presumption be treated merely as a safeguard with which the law surrounds every person accused of crime, the supposed defects in the definition of a reasonable doubt will at once appear more fanciful than real.

It is inaccurate to say, in the language of the supreme court of Mississippi: "Such a doubt *may* arise from a want of evidence." It always does, and of necessity must, arise from a want of evidence, by which we mean a want of sufficient evidence; for in every criminal case where there is a plea of not guilty, if the state does not introduce any evidence, the question of a reasonable doubt never arises; for there is not a court in the land but what under those circumstances would peremptorily direct a verdict of not guilty. But, if the state does offer evidence sufficient in the judgment of the trial court to go to the jury, then the jurors under their oaths must consider such evidence, and such evidence alone, in determining whether the safeguard erected by the presumption of innocence has been completely destroyed. It is completely destroyed when, and only when, the jurors can say from the evidence introduced that they feel an abiding conviction to a moral certainty of the truth of the charge against the accused. If the evidence leads to a conclusion which satisfies the judgment of the jurors, and leaves upon their minds a settled conviction of the truth of the charge, it is then their duty to so declare by their verdict. But in every such contested case their consideration is directed to the evidence introduced, and from that evidence they must say whether they still retain a reasonable doubt of the guilt of the accused. It is in this sense that it is said that a reasonable doubt is not a doubt suggested or surmised without foundation in the facts or testimony. In other words, the jurors may not predicate a doubt upon street rumor, or facts not in evidence, nor upon theories outside of the record, which may be suggested by the ingenuity of counsel, or upon a merciful inclination to permit the accused to escape, prompted by sympathy for him in his apparently unequal contest with the state.

The definition now under consideration, which is in substance that of Chief Justice Shaw, has met with widespread approval. (Hughes on Criminal Law and Procedure, secs. 2488, 3263; Hochheimer on Criminal Law, sec. 157; 12 Cyc. 491.) Speaking of this definition, the supreme court of California, in *People*

v. *Strong*, 30 Cal. 151, said: "And in the general charge of the court the jury were instructed in relation to the subject of reasonable doubt substantially in the language of Mr. Chief Justice Shaw, in the case of *Commonwealth v. Webster*, 5 Cush. (Mass.) 320, 52 Am. Dec. 711, which is probably the most satisfactory definition ever given to the words 'reasonable doubt' in any case known to criminal jurisprudence." And in this conclusion we agree. We do not think that the other objections to the instruction are well founded.

3. Exception is likewise taken to the giving of instruction No. 9, which is a literal copy of the first sentence of section 2442 of the Penal Code. But it is said that a court ought not to single out a particular witness and direct the attention of the jury to his testimony; and that this is the general rule is well settled and has been recognized by this court. (*Mahoney v. Dixon*, 34 Mont. 454, 87 Pac. 452.) But the Code, in section 2442 above, has made an exception to this general rule. That section particularly states by what standard the jury shall judge of the defendant's credibility; and, in order that they may have this standard which the law has fixed, it is necessary that it be given in a proper instruction. In support of their contention counsel for appellant cite *People v. Maughs*, 149 Cal. 253, 86 Pac. 187; but, as this court said in *State v. Farnham*, 35 Mont. 375, 89 Pac. 728, the instruction criticised in the *Maughs Case* is not the one given here. And, furthermore, California does not have a provision of the Criminal Code similar at all to section 2442 above. (See California Penal Code, Title X, Chapter II.) The instruction has received the approval of this court, and we are satisfied that it was properly given in this case. (*State v. Dotson*, 26 Mont. 305, 67 Pac. 938; *State v. Farnham*, above.)

4. Instruction No. 10 is also criticised. But this instruction, while not approved, is held in *State v. Penna*, 35 Mont. 535, 90 Pac. 787, not to be prejudicially erroneous, under circumstances similar to those we have here.

5. Instruction No. 12 attempts to define larceny; but, standing alone, is insufficient for that purpose. (*State v. Peterson*, 36 Mont. 109, 92 Pac. 302.) But this defect in the instruction is fully cured by instruction No. 17, which, though not technically correct, is not open to any objection urged against it here by counsel for appellant. It is not in any sense contradictory of No. 12, but supplementary of it. The instructions must be considered as a whole.

We find no prejudicial error in the record. The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE SMITH: I agree with the result reached by Mr. JUSTICE HOLLOWAY in the foregoing opinion. But I am inclined to think, despite the fact that the definition of "reasonable doubt" therein discussed has been employed by the courts of this and other states for so many years, and has been approved, that it is not too late to discourage the practice of giving it to juries in criminal cases. It seems that the English language is inadequate to satisfactorily define the phrase "reasonable doubt." Some courts are not satisfied with the definition approved by this court. How, then, shall a jury of laymen be guided or aided by it? Perhaps the reason why the words are difficult of explanation is because they are so ordinary and simple. At any rate, the definition, although the best that has ever been given and perhaps the best that can be framed, is so complicated and involved that it is more difficult to understand than are the words the meaning of which the courts have attempted to explain.

I do not think the words "reasonable doubt" require explanation. I believe that any juror who has not the mental capacity to understand the words themselves could not possibly comprehend the definition given to them by the courts. How can it be said that a juror could not understand what is meant by a "reasonable doubt" but would know the meaning of the words

“an abiding conviction to a moral certainty,” used in the definition? I think any intelligent juror will appreciate the scope of his duty when told that, before he is justified in arriving at a verdict of guilty, he must be satisfied of the guilt of the defendant from the evidence, beyond a reasonable doubt; and that no other or further charge should be given on this subject.

An experience of over twenty years at the bar and on the trial bench enables me confidently to assert that, in criminal causes, more confusion in the minds of jurors, and more illogical verdicts, result from attempts by the court to define a reasonable doubt than from all other causes, save alone the conflict of testimony. Added to this, it is matter of common knowledge in the profession that this definition is seized upon by unscrupulous counsel, representing defendants oftentimes palpably guilty upon the evidence, and industriously repeated and reiterated, to impress upon the jurors that the words have some deeply occult meaning, known only to those engaged in the trial of criminal cases, which they, as jurors, are bound, on their oaths, to apply, or find the defendant not guilty; and that, having solemnly sworn, both generally and in answer to numerous questions touching their competency to sit as jurors, to give the defendant the benefit of every reasonable doubt, as defined by the court, there attaches to their deliberations some new and wonderful quality, pertaining more to deity than to mortals, prohibiting them from arriving at a conclusion by any mental process ever before exercised by them; that they must, as jurors, discard their everyday habits of thought and judgment, and use their minds in an entirely different manner from that which, as men, they would employ in their own important affairs. I believe the system of paternalism practiced toward jurors today, upon the theory apparently that they are as incapable of forming an intelligent judgment as were the yokels of four hundred years ago, should be abandoned, lest in trying to explain the meaning of the most common words and terms we convey to jurors the idea that the law, instead of being founded in common sense, deals in nothing but technicalities.

We hold in this state, in common with many other states in the Union, that it is error for the trial court, usually presided over by a lawyer of experience and ability, to comment in any manner upon the weight of the evidence; and the application of the doctrine has been carried, in my judgment, to the extent of absurdity. But we give instructions to juries that would puzzle a scholastic logician to analyze; and then criticise the jury system. I have talked with highly intelligent jurors—men who were successful in their private affairs—who seemed to feel that a juror must discard all human attributes, and change all his usual mental habits in order to arrive at a verdict in a criminal case according to law. I have heard jurors say, in defense of a verdict of acquittal, in a case where every unsworn person who heard all of the evidence had no doubt whatsoever of the guilt of the defendant: "It was the only thing we could do under the charge of the court." And this after the court had laboriously instructed the jury that they were the sole and exclusive judges of the facts in the case, and that the instructions were merely a guide to the law. This is one of the principal reasons why we have mistrials and wrong verdicts in plain cases involving enormous expense, and why the popular defense of insanity can be successfully interposed in so many murder trials.

After all, a reasonable doubt is not a thing to be described. It is a state of mind, not, ordinarily, to be accounted for by pointing out any particular testimony in the record. Doubts come and go, and reappear during the progress of the trial. The jurors are admonished by the court not to make up their minds concerning the guilt or innocence of the accused until the case is finally submitted to them (an admonition admirable in theory, but ridiculous in practice, because usually impossible of obedience). More paternalism. And, while the jury knows nothing of it, the trial judge is, in fact, almost powerless. He is a mere puppet in the trial, an umpire whose authority is limited to passing upon questions of admissibility of evidence. If he gives to the jury anything more than abstract propositions of law (and the appellate courts say he should not give those),

he is accused, and generally convicted, on appeal, of commenting upon the weight of the evidence.

A juror cannot tell when the reasonable doubt first lodged in his mind. Certainly it was not, in most instances, after the case was finally submitted to him. I undertake to say that every honest juror who, upon the whole evidence, has in his heart a reasonable doubt of the defendant's guilt, will act upon it, without analysis or application of definition. He will unconsciously heed it without seeking to explain it. When his mind harbors a doubt that prevents his conscientiously voting guilty, that doubt will be expressed in a vote for acquittal.

I maintain, therefore, that we should give our trial judges credit for the integrity, learning, discretion and consideration for their oaths of office that they in reality possess, and that our jurors should be treated as men of intelligence, and not as children.

RILEY, ADMINISTRATRIX, RESPONDENT, v. NORTHERN PACIFIC RY. CO., APPELLANT.

(No. 2,479.)

(Submitted February 10, 1908. Decided February 17, 1908.)

[93 Pac. 948.]

Railroads — Crossings — Injuries — Instructions — Ordinances — Last Clear Chance—Positive and Negative Evidence—Weight.

Railroads—Injuries—Directed Verdict.

1. A motion of defendant railway company for a directed verdict in an action against it for negligently killing plaintiff's intestate while crossing its tracks within city limits was properly overruled, where, under the evidence, the question whether defendant was negligent was one for the jury, as was also the question of decedent's alleged contributory negligence.

Same—Instructions.

2. The giving of an instruction, in an action to recover damages from a railway company for the negligent killing of a pedestrian while crossing, Vol. 36—35

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ing its tracks, substantially consisting of a statement of the pleadings, was not reversible error.

Positive and Negative Evidence—Weight.

3. When one witness testifies positively that a certain thing existed or happened, and another witness, with equal means of knowing, testifies that the thing did not exist or happen, the so-called negative testimony is so far positive in its character that a court cannot say that it is entitled to less weight than the affirmative testimony.

Same—Railroads—Injuries at Crossings—Instructions.

4. In an action for damages for the death of one struck by an engine while crossing defendant's tracks, there was evidence for defendant that the bell was ringing and a headlight burning. Plaintiff's witnesses testified that they did not hear any bell or see any light. Defendant's witnesses swore that they did not see the deceased at all, although the engineer claimed he was looking toward the very spot where the accident happened. *Held*, that the court properly refused to charge that it was proved by the uncontradicted evidence that the bell was ringing and the headlight burning, that the ringing and the light were a sufficient warning, and that, if no other negligence was shown, the verdict must be for defendant.

Railroads—Personal Injuries—Instructions.

5. The court in the case above referred to having distinctly instructed the jury to limit their consideration to acts of negligence proven by the evidence, it was not prejudicial error to refuse to charge, relative to an allegation in the complaint that the speed of the engine exceeded a certain limit—a fact unproven—that the evidence uncontradictedly showed that the speed of the engine was less than the prescribed limit, and that this question should not be considered, but that, if no other negligence appeared, verdict should be for defendant.

Same—Ordinances—Instructions.

6. The absence of a city ordinance requiring a railway company to provide a flagman at a crossing is not conclusive upon the question whether or not the company was negligent in failing to provide one of its own accord; it was, therefore, not error to refuse to charge in the action above set forth that an ordinance, alleged in the complaint to have been violated, had no reference to the crossing at which plaintiff's intestate was killed.

Same—Evidence—Admissibility—Harmless Error.

7. In an action for the death of one struck by a switch-engine while crossing defendant's tracks, where it was shown that there was a gate at each side of the crossing, but that on account of the lessened travel between the hours of 12 o'clock midnight and 6 o'clock in the morning the gates were not used, and that the deceased was killed during such hours, and further, that the mayor had never designated the crossing as one where a flagman was required, it was not prejudicial to defendant to admit in evidence an ordinance requiring a railroad to keep a flagman at such crossings unprotected by gates as may be designated by the mayor from time to time, since the jury must have known that the mayor had never required a flagman at the crossing in question, and therefore could not have considered that the company was negligent in failing to provide a flagman at such crossing on account of the fact that the mayor had designated it as one of the crossings where a flagman should be employed.

Same—Instructions.

8. Nor was it error to refuse to instruct the jury in the above action that, in determining whether a reasonable person could have seen the approaching engine, the jury could take into consideration what other

persons coming after decedent saw in this regard. This was proper matter for argument to the jury and not for an instruction to them.

Same—Instructions—Applicability to Evidence.

9. Where in an action against a railway company for the negligent killing of a person it was not shown that decedent had assumed a position of known danger, or that the place where he was killed was not, apparently, a place of safety, the court correctly refused to charge that in thus failing to exercise ordinary care or reasonable prudence he was guilty of contributory negligence and defendant company would not be liable, where in other instructions the question of contributory negligence had been fully covered; the requested charge was properly refused, also, for failing to refer to the duty of the defendant to exercise ordinary care to protect the deceased in the position in which he found himself.

Same—Instructions—Refusal.

10. In an action for the death of one struck by an engine while crossing defendant's tracks and attempting to get out of the way of a coming passenger train, there was no error in refusing to charge that in any event, if the deceased was at fault in putting himself in a position where a movement to avoid the dust of the passenger train would bring him within striking distance of the switch-engine, there could be no recovery on the ground of the speed of the passenger train, since the instruction omitted the element of defendant's duty to take reasonable care to avoid injuring the deceased in the position in which he placed himself.

Same.

11. Error was not committed in refusing to instruct the jury in the case mentioned above, that there was nothing in the evidence showing traffic conditions, at the crossing where the accident occurred between the early hours in the morning when deceased was killed, requiring the operation of crossing-gates independently of any ordinance or regulation; the giving of this instruction would have withdrawn from the jury the question at issue, whether defendant exercised ordinary care in moving its engine across the street under all the circumstances disclosed.

Same—Ordinary Care—Question for Jury.

12. Whether or not the railway company in the case above exercised ordinary care in moving its engine over a crossing provided with gates while the gates were up, and in the absence of a watchman in the tower, was a question for the jury.

Same.

13. It was also a question for the jury to decide whether the defendant company, in the exercise of ordinary care, might have discovered the position of the deceased in time to have avoided injuring him, irrespective of the question whether deceased had exercised ordinary care in going into the place where he was killed, or not.

Same—Care Required.

14. Upon a railroad company is imposed the duty of using all reasonable efforts to avoid injury to one who has accidentally placed himself in a position of danger, if it knows the peril, or, by the exercise of reasonable care, might have known it.

Negligence—Contributory Negligence—Last Clear Chance—Instructions—Argument—Issues.

15. Where all the testimony in the above case relating to the last clear chance to avoid the injury went in without objection under the issues made by the complaint and answer, the doctrine of the last clear

chance was a legitimate subject for argument to the jury and of instruction by the court, though no such issue was raised by the reply to the plea of contributory negligence.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

ACTION by Esther L. Riley, as administratrix, against the Northern Pacific Railway Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Messrs. Wallace & Donnelly, for Appellant.

"If one, upon approaching a railroad crossing, intending to pass over it, fails to make a vigilant use of his senses—that is, to look or listen, and to stop for this purpose, if necessary, to learn if there is danger—and by reason of this failure to exercise this precaution he is injured, then he contributes directly to such injury, and cannot be heard to say that the railroad company did him the injury, and should compensate him for its wrong." (*Hunter v. Montana C. Ry. Co.*, 22 Mont. 525, 57 Pac. 140.) Open gates at a railroad crossing do not excuse a pedestrian's failure to exercise care in crossing the tracks. (*Koch v. Southern California Ry. Co.*, 148 Cal. 677, 113 Am. St. Rep. 332, 84 Pac. 176, 4 L. R. A., n. s., 521; *St. Louis etc. Ry. Co. v. Chapman*, 140 Fed. 129, 71 C. C. A. 523; *McClary v. Chicago etc. Ry. Co.*, 46 Fed. 343.) Plaintiff's evidence on the issue whether there was a headlight on the rear of the switch-engine, and whether the bell was rung, left nothing to submit to the jury on this point. (*Culhane v. New York etc. Ry.*, 60 N. Y. 133-137; *Hubbard v. Boston etc. Ry. Co.*, 159 Mass. 320, 34 N. E. 459; *Keiser v. Lehigh Valley Ry. Co.*, 212 Pa. St. 409, 108 Am. St. Rep. 872, 61 Atl. 903; *Holmes v. Pennsylvania Ry. Co.* (N. J.), 66 Atl. 412.) A railroad crossing, from its very nature, is always a place of danger, and the traveler has no right to omit any of the care which the law demands of him upon the assumption that due care will be exercised in the operation of

the train. (*Hutson v. California Southern Ry. Co.*, 150 Cal. 701, 89 Pac. 1093.)

Respondent sets up the newly advanced idea that the defense of contributory negligence is unavailing to the defendant because of the doctrine of the last clear chance. We answer: (1) The issue of last clear chance was not presented by the reply. Negligence was plead, contributory negligence was plead, and the reply merely denied the contributory negligence, but set up no matter in the nature of subsequent negligence in avoidance. If it be said that the facts would necessarily spring from the occurrence, it is no answer, as this is true also of contributory negligence. Nevertheless, the plea is always required because it is matter that may be waived; and this court in *Orient Ins. Co. v. Northern Pacific*, a case in which the proofs were submitted as if the issue was framed, refused to consider the question despite the consent of counsel on the trial, because contributory negligence was not affirmatively plead in the answer. (See, also, *Holmes v. Pennsylvania Ry. Co.* (N. J.), 66 Atl. 412.) (2) The doctrine of last clear chance never applies when the negligence of the deceased is operative up to the moment of the injury, and in this case the deceased stepped back within range of the switch-engine just before he was struck and while the switch-engine was on the east walk. (*Matteson v. Southern Pac. Ry.* (Cal. App.), 92 Pac. 101.) And (3) The dust cloud, testified to, would have prevented those on the engine from seeing the deceased or from doing anything to prevent the accident. (*Baker v. Tacoma Eastern Ry. Co.* (Wash.), 87 Pac. 826.)

Mr. Fred. H. Hathhorn, and Mr. George W. Farr, for Respondent.

Plaintiff is entitled to the benefit of the presumption that deceased was exercising due care, unless it conclusively appears from the evidence adduced that the deceased was guilty of negligence directly contributing to his own injury. (*Weller v. Chicago etc. R. R. Co.*, 164 Mo. 180, 86 Am. St. Rep. 592, 64

S. W. 141; *Riska v. Union Depot Ry. Co.*, 180 Mo. 168, 79 S. W. 445.) It was negligence to move the switch-engine backward while the passenger train was in motion, and appellant will be charged with the knowledge that the bell on the engine could not be heard when a passenger train was running at excessive speed, and with the duty of observing greater precaution in the manner of the operation of the engine, and whether it did observe all the precaution required of it was a question for the jury. (*McWilliams v. Detroit Central Mills Co.*, 31 Mich. 274; *Cooper v. Lake Shore etc. Ry. Co.*, 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306; *Lehman v. Eureka Iron and Steel Works*, 114 Mich. 260, 72 N. W. 183; 2 Thompson on Negligence, secs. 1571, 1594; *Union Pac. Ry. Co. v. Connolly* (Neb.), 109 N. W. 368; *Louisville etc. Ry. Co. v. Lucas*, 80 Ky. Law. Rep. 359, 98 S. W. 310; *Schleiger v. Northern Terminal Co.*, 43 Or. 4, 72 Pac. 324.) The crossing was an exceedingly dangerous one, and more care was therefore required of the appellant. (*Bilton v. Southern Pac. Ry. Co.*, 148 Cal. 443, 83 Pac. 440; *McCabe's Admz. v. Maysville etc. Ry. Co.*, 28 Ky. Law Rep. 536, 89 S. W. 683.)

The duty of deceased to look does not mean that he must be constantly turning from one direction to the other. (*St. Louis etc. Ry. Co. v. Wyatt*, 79 Ark. 241, 96 S. W. 376; *Chicago etc. R. Co. v. Pulliam*, 111 Ill. App. 305, affirmed in 208 Ill. 456, 70 N. E. 460; *Chesapeake etc. R. Co. v. Vaughn*, 30 Ky. Law Rep. 215, 97 S. W. 774.) It will not be presumed that he recklessly and carelessly imperiled his own life. (*Cromley v. Pennsylvania Ry. Co.*, 208 Pa. St. 445, 57 Atl. 832.) It is not consistent to argue that the deceased might have escaped but for a rash attempt to save himself, with appellant's contention that he lost his life as a result of his own carelessness in not looking for the train, or heeding its signals. (*Louisville etc. R. Co. v. Lucas, Admr., supra.*) Deceased was only required to do what was reasonable under the existing circumstances. And the reasonableness of his efforts to escape injury after discovery of the danger was a question for the jury. (*Bilton v. Southern Pac.*

Ry. Co., 148 Cal. 443, 83 Pac. 440.) Nor was he bound to the same vigilance to stop, look and listen as he would if there had been no gates, for there was an implied invitation to cross and an assurance of safety from danger of any passing train, by reason of the gates being up and open. (*Koch v. Southern Ry. Co.*, 148 Cal. 677, 113 Am. St. Rep. 332, 84 Pac. 176, 4 L. R. A., n. s., 521, and case note, cited by appellant.) Where a railroad company has erected gates at a dangerous crossing, it is its duty to slacken speed when the watchman is off duty and the gates are open. (*Schwartz v. Delaware L. & W. R. Co.*, 211 Pa. St. 625, 61 Atl. 255; *Stegner v. Chicago etc. Ry. Co.*, 94 Minn. 166, 102 N. W. 205.)

The defense of contributory negligence will not avail the appellant, if, by reasonable care on the part of those in charge, the accident could have been avoided; and if by exercising ordinary care, the servants of the appellant could have discovered the peril of the deceased in time to stop the engine, or if in fact they did see the deceased and neglected to stop the engine, the case is one for the jury. (*Yeaton v. Boston & M. R. R.*, 73 N. H. 285, 61 Atl. 523; *Fearsons v. Kansas City El. Ry. Co.*, 180 Mo. 208, 79 S. W. 394; *Turnbull v. New Orleans & C. R. Co.*, 120 Fed. 783; *Louisville & N. R. Co. v. Krey*, 16 Ky. Law Rep. 797, 29 S. W. 869; *Kelley v. Hannibal & St. J. Ry. Co.*, 75 Mo. 138; *Central Texas etc. Ry. Co. v. Gibson*, 35 Tex. Civ. App. 66, 79 S. W. 351; *Cooper v. Lake Shore etc. Ry. Co.*, 66 Mich. 261, 11 Am. St. Rep. 492, 33 N. W. 306; *Illinois Central R. Co. v. Hayes' Admr.*, 27 Ky. Law Rep. 91, 84 S. W. 338; *Nashua Iron and Steel Co. v. Worcester etc. R. R. Co.*, 62 N. H. 159, 164; *Atlantia Coast Line Ry. Co. v. Taylor*, 125 Ga. 454, 54 S. E. 622.) The following cases illustrate the amount of vigilance required on the part of railway companies in backing trains over crossings where another train is passing on an adjoining track, and hold that whether sufficient care and caution has been exercised and observed is a question for the jury from the circumstances surrounding each case: *Illinois Central R. Co. v. Hays*, 27 Ky. Law Rep. 91; *McWilliams v. Detroit Cen. Mills*

Co., 31 Mich. 274; *Cooper v. Lake Shore etc. Ry. Co.*, 66 Mich. 261, 11 Am. St. Rep. 492, 33 N. W. 306; *St. Louis etc. Ry. Co. v. Johnson*, 74 Ark. 372, 86 S. W. 282; *Atlantic Coast Line Ry. Co. v. Taylor*, 125 Ga. 454, 54 S. E. 622; *Massey's Adm'r. v. Southern Ry. Co.*, 106 Va. 515, 56 S. E. 275; *Chesapeake & Ohio Ry. Co. v. Vaughn*, 30 Ky. Law Rep. 215, 97 S. W. 774; *Union Pac. Ry. Co. v. Connolly* (Neb.), 109 N. W. 368.

In the case of *Christensen v. Oregon Short Line Ry. Co.*, 29 Utah, 192, 80 Pac. 746, the court held that while the defendant's failure to keep a flagman, and to maintain gates at the crossing, was not alleged in the complaint as a ground of negligence, yet it was not error for the court to admit evidence to show that there was neither gates or flagman there. (See, also, *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Butts v. Atlantic etc. Ry. Co.*, 133 N. C. 82, 45 S. E. 472; *Ortolano v. Morgan's etc. Ry. Co.*, 109 La. 902, 33 South. 914; *Aurora Elgin etc. Ry. Co. v. Gary*, 123 Ill. App. 163; *Illinois Cent. R. R. Co. v. Coley*, 28 Ky. Law Rep. 336, 89 S. W. 234, 1 L. R. A., n. s., 372.)

MR. JUSTICE SMITH delivered the opinion of the court.

Between 2 and 3 o'clock on the morning of July 18, 1905, two men, named Reuben A. Riley and George Cresap, were struck and instantly killed by a switch-engine of the Northern Pacific Railway Company on the Twenty-seventh street crossing of the tracks of that company in Billings, Montana. This action was begun by the plaintiff, the widow and administratrix of the estate of Reuben A. Riley, to recover damages for his death, on the ground that it was due to the negligence of the railway company and its employees. Foster L. Skillman, the engineer in charge of the switch-engine, was joined with the railway company as defendant; but no verdict was returned or judgment entered against him. The railway company appeals from a judgment against it, founded upon a verdict for \$12,600, and from an order denying its motion for a new trial.

As is well said in the brief of counsel for the appellant, the negligence relied on by the plaintiff is set forth in the complaint with a degree of fullness seldom found in cases of this character. The tracks of the defendant company extend east and west through the city of Billings. The streets immediately north and south, and running parallel with them, are, respectively, Montana avenue and Minnesota avenue. A number of streets cross the tracks at right angles from north to south, among them Twenty-seventh street. This last-named street is the first street east of the depot of the defendant, and is one of the streets most used in passing to and fro between Montana and Minnesota avenues. At the time of the accident the defendant had seven tracks constructed and in use across Twenty-seventh street. Starting with the most northerly track, and numbering them as they lay, track No. 2, or the first track south of the most northerly track, was the main line, tracks Nos. 1, 3, 4, 5, 6, and 7 being sidings. The distance from the south rail of the main line to the north rail of track No. 3 was ten and four-tenths feet. Sidewalks twelve feet wide extend north and south along each side of Twenty-seventh street. The street is eighty feet in width, including the sidewalks, and fifty-six feet in width between the sidewalks. The planking of the walk is practically level with the rails of the track. Between tracks 1 and 2, and a little to the east of the east sidewalk, there is a watchtower from which crossing-gates are raised by a man stationed there. A watchman was kept in the tower from 7 A. M. until midnight. From about 9 or 10 o'clock in the evening of July 17th until shortly before he was killed the deceased was at the Topic Saloon or Theater on Minnesota avenue, about two hundred and fifty feet east of the east walk of Twenty-seventh street, and was expecting to meet his wife, the plaintiff, who was coming to Billings from Miles City on train No. 3, due to arrive in Billings at 2:05 A. M., and which did arrive at 2:23 A. M.

All that is known of the manner in which deceased was killed is what was told on the stand by plaintiff's witness Mueller. The witnesses Hayden and Rex were with Mueller at the time, but

neither would believe that a man had been struck when Mueller affirmed that he had observed the fact. The testimony of Mueller was, in substance, as follows: Just before the accident Mueller, Hayden and Rex were together on Minnesota avenue, west of Twenty-seventh street. Hayden was to leave for the west on train No. 3, and Mueller and Rex were going to see him off. They heard the train whistle, and the three men came together to the southwest corner of Minnesota avenue and Twenty-seventh street, and crossed diagonally to the northeast corner, striking the east sidewalk of Twenty-seventh street near the south corner of a woolhouse there situated, and then walking north on the east walk of Twenty-seventh street. As they crossed to the woolhouse corner, Mueller noticed two men right ahead. The crossing-gates were up, and the witness saw no one in the tower. When he first saw the two men, they may have been on track 3 or track 4, and were going north on the east sidewalk. By the time witness had walked probably fifty feet on the east sidewalk the two men ahead stopped. The witness did not know who they were or why they stopped, though the passenger train was going across Twenty-seventh street just then, and they stopped on the south side of the passenger train. He estimated that the passenger train, which was on the main line going west, was running fully twenty miles an hour until it struck the Twenty-seventh street crossing, and was going very fast across the street. As this train No. 3 was crossing the street he noticed a switch-engine backing up from the west side of Twenty-seventh street on track No. 3, the first track south of the main line. It had been standing on the west side of the street, and when he saw it start to back up train No. 3 was in motion across Twenty-seventh street. The train and the engine passed at the same time, train No. 3 moving west, and the switch-engine backing east across that street. When the switch-engine crossed the east walk, the witness and his two friends stopped to let it pass. He thought that he and his friends were then on or just north of track No. 4, within six or eight feet of the switch-engine. Just as he stopped he saw the men he had noticed in front of him. One of them

stepped back, and witness saw him fall. As the passenger train was coming in the witness saw a cloud of dust roll up beneath the train. He could not say to what extent it rolled up, any more than that he saw the dust. It was sufficient so that he could see it from where he stood. He could not say for sure whether the man who, as he had said, stepped back, had really stepped back, or whether he had faced the other way, and stepped forward, but, whichever it was, the movement was made just as the passenger train was alongside where this man stood. The witness thought the man was standing between track No. 2 and track No. 3, on which the switch-engine was moving when he made this backward movement. On seeing the man fall, witness said to his friends, "There was a man run over." After the switch-engine had passed they saw a corpse lying twenty feet away. The witness went to send in an alarm to the police station, and his friends ran east to notify the switching crew. A little east of the point where lay the first body, a second body was found. The bodies were those of Reuben A. Riley and George Cresap. The foregoing is a summary of Mueller's testimony, substantially as set forth in the brief of appellant.

Now as to the pleadings. The plaintiff charged in her complaint that the negligence of the defendant consisted in the following: (1) Failure to lower the crossing-gates before the deceased started across the tracks; (2) excessive speed of train No. 3 in crossing Twenty-seventh street; (3) excessive speed of the switch-engine in backing across Twenty-seventh street; (4) failure of the employees in charge of the switch-engine to give any warning, or ring a bell, or blow a whistle, in backing across the street; (5) negligence in moving the switch-engine across the street while the passenger train was coming into the depot; (6) failure to have a switchman at the rear end of the switch-engine while it was backing across the street; (7) failure to have any light or signal at the rear end of the switch-engine to warn persons of its approach; (8) failure of the engineer and fireman of the switch-engine to keep a lookout for persons on the street while they were backing across it; and (9) failure to have

a flagman at the crossing to warn people of the approach of trains, by waving a red flag, as required by the city ordinances.

The defendant railway company denied negligence on its part, or that of its servants, and alleged that the death of Riley was caused by his contributing fault and carelessness.

The first error complained of is the refusal of the court to direct a verdict for the defendant at the close of plaintiff's case. We are of opinion that the court was right in refusing to grant this motion. The specifications of negligence set forth in the complaint, numbered from 3 to 9, comprehend, in substance, the proposition that the railroad company was negligent in not properly guarding this crossing while the switch-engine was passing over it. Whether the company was or was not negligent in this regard was a proper question to be submitted to the jury under the testimony of Mueller, as herein recited. We think the question of contributory negligence on the part of the deceased was also properly submitted. We cannot say that different minds might not properly reach different conclusions relative to both of these questions under the evidence.

The second contention is that the court erred in giving instruction No. 1 to the jury. This instruction is very long, and it is unnecessary to repeat it here. It is, in effect, a statement of the matters set forth in plaintiff's complaint, including the various reasons assigned by the plaintiff as a basis for her averment that the defendant was negligent. This instruction embodies the language of the complaint almost literally, and, regarding it as merely a statement of the issues made by the pleadings, we find no error in it, but think the jury must have understood that it was simply a statement of what the plaintiff claimed and what the defendant relied upon as a defense. In this connection it is claimed by the defendant that the reason the giving of instruction No. 1 may have been prejudicial was, because it contained a recital of claims made by the plaintiff which were not afterward substantiated by testimony, and that the court refused to give certain other instructions eliminating from the

consideration of the jury those alleged acts of negligence which were unproven.

The next instruction complained of is No. 9, which reads as follows: "The complaint in this action sets forth the particular respects in which the plaintiff claims there was a breach of duty. The plaintiff, having detailed thus the features of claimed negligence, must be limited to those specifically, and you have no right to consider in this case any other alleged grounds of negligence than those enumerated in the fifth paragraph of the complaint, and it is your duty as jurymen to limit your deliberations to those and to those only in so far as the alleged fault of the defendant railway is concerned." This instruction is so palpably in favor of the defendant that it cannot be complained of except in this regard—that the court, having limited the matters to be considered by the jury to the specific acts of negligence set forth in the complaint, should have gone further and given other instructions, taking from the jury's consideration accusations of negligence which the defendant claims were not proven. We shall consider this later.

It is contended that the court erred in refusing to give defendant's requested instructions Nos. 33, 34, 35, and 36. Those tendered instructions read as follows:

"33. As to the alleged ground of negligence set forth in subdivision B of said paragraph of the complaint, which claims that the switch-engine was moved without a light, or any warning by bell, or otherwise, I advise you that, though it was proven that there was no switchman or other person on the rear of such switch-engine as it moved backward, yet it is proved by the uncontradicted evidence that the bell was ringing, and that there was a headlight upon the rear end of the switch-engine, lit, and shining in the direction toward which the engine was moving, that the ringing of the bell and the presence of the headlight were a sufficient warning, and that the law did not impose upon the defendant any duty in addition to have any person upon the footboard of the rear of the engine to give additional warning, and that, therefore, the averments of this subdivision are un-

proven, and that the absence of a switchman or other person at the rear of said engine would not be a ground of recovery in this case, and if there were no other negligence proven, your verdict must be for the defendant railway.

"34. As to the alleged negligence set forth in subdivision C of said paragraph of the complaint, the alleged failure to ring the bell or blow the whistle while the switch-engine was crossing Twenty-seventh street, and the averment that its speed then was greater than six miles per hour, I advise you that the evidence uncontradictedly shows that the bell was rung, and that the rate of speed of the switch-engine was less than six miles per hour, and that this alleged ground of negligence is not only unproven, but is disproved, and you cannot consider it as a ground of recovery, and, if no other negligence were proven, your verdict must be for the defendant.

"35. As to the alleged ground of negligence set forth in subdivision F of paragraph 5 of the complaint, viz., the allegation that defendant's engineer did not ring the bell as required by the provisions of section 2 of the same article of the Billings ordinances, I advise you that the ringing of the bell by the fireman of the locomotive would be a compliance with this ordinance. I further advise you that the evidence uncontradictedly discloses that the bell was rung as required by this ordinance, and that you cannot consider this question as a ground of recovery, because no breach of any duty in this respect has been proven.

"36. As to the specifications of the alleged fault of the defendant company contained in subdivision G of the fifth paragraph of the complaint, the violation of section 3 of article 2 of chapter 12 of the Billings ordinances, dealing with flagmen, I instruct you that that ordinance has no application to this case, and that, while it was read in evidence, and it appeared that there was no flagman at this crossing, there was no duty to have a flagman at this crossing, and the failure to have a flagman at this crossing cannot be considered by you as a ground of recovery, and, if no other alleged negligence than this were proven, your verdict must be for the defendant railway."

Appellant affirms that it was proven by the uncontradicted evidence that the bell was ringing, and that there was a headlight upon the rear of the switch-engine. On the part of the defendant there was positive testimony that the bell was ringing and the light burning. The plaintiff's witnesses simply testified that they did not hear any bell or see any light. Appellant argues that this negative testimony is of no weight, in view of the positive testimony opposed to it. Ordinarily, when one witness testifies positively that a certain thing existed or happened, and another witness, with equal means of knowing, testifies that the thing did not exist or happen, the so-called negative testimony is so far positive in its character that a court could not say that it was entitled to less weight than the affirmative testimony. (*State v. McLeod*, 35 Mont. 372, 89 Pac. 831.) But the appellant says that in this case the testimony that the witnesses did not hear the bell rung or see the light burning is in no sense a statement that the bell was not rung or the light not burning, and consequently the positive statements are uncontradicted. But, in passing upon the weight to be given to this testimony, the jury had a right to take into consideration all of the surrounding circumstances, including the fact that defendant's witnesses, who were its employees, swore that they did not see the deceased at all, although, if the light had been burning, as these witnesses testify it was, it seems almost impossible that the engineer, who claims he was looking toward the very spot where the travelers were, should not have seen them. In view of this situation, it is equally clear to us that the jury had a right to take into consideration the testimony regarding the headlight in determining whether or not the defendant's witnesses were entitled to credit in testifying that the bell was ringing. This being the case, the court properly refused to give proposed instruction No. 33 to the jury.

What is said last above partly covers the action of the court in refusing to give proposed instruction No. 34. In addition to that, however, there is incorporated in this proposed instruction the feature that the evidence uncontradictedly shows that

the rate of speed of the switch-engine was less than six miles per hour; and defendant argues that for this reason the court should have taken from the jury the right to consider the speed of the switch-engine in determining their verdict. Let it be remembered that instruction No. 1 is simply a recital of the issues made by the pleadings, and nowhere in the instructions did the court tell the jury that they should consider the speed at which the switch-engine was going in arriving at a verdict. The error complained of is the refusal of the court to tell the jury that they must not consider the matter at all; for the reason that the evidence wholly fails to substantiate this allegation of negligence. It is true that the evidence does show positively that the switch-engine was not moving at a rate of speed exceeding six miles an hour. How can it possibly be conceived that the jury determined that the engine was exceeding six miles per hour and considered that fact in arriving at a verdict? This jury, of course, knew that there was no testimony whatsoever warranting them predicating negligence upon the speed of the switch-engine. They must have known it; therefore they could not have given any consideration to the subject in determining the liability of the defendant. It would have been proper for the court to withdraw this matter from the jury's consideration peremptorily, and we do not desire to be understood as holding that, in a proper case, the court should not do so. In this case, however, we are satisfied, in view of the state of the testimony, that no prejudice resulted to the defendant from the refusal of the court. Note, also, the following instruction given by the court, limiting the jury to a consideration of those "faults * * * proven by the evidence": "If you fail to find fault on the part of the defendants in the respect in which you are told above that under this complaint you may consider whether they are at fault, you will proceed no further in the case, but stop your deliberations, and return a verdict for the defendants. If you should find that fault in a respect which I have told you would entitle the plaintiff to recover, and which has been proven by the evidence, then you will next proceed to consider the ques-

tion as to whether the deceased (Riley) himself was guilty of any fault contributing to his own death."

So far as proposed instruction No. 36 is concerned, it may be said, generally, that the question of the negligence of a railroad company in failing to provide a flagman at a crossing cannot alone be determined by ascertaining whether or not a city has by ordinance required that a flagman should be employed. It is oftentimes a question of fact, to be determined by the jury, whether, in the exercise of that degree of care with which the defendant is charged, it should or should not maintain a flagman. The existence of an ordinance requiring a flagman may be some evidence of the necessity for one, but the absence of such an ordinance is not conclusive upon the question.

The defendant also contends that the court erred in admitting in evidence, over its objection, section 3 of article 2, chapter 12, of the Ordinances of the City of Billings, providing that a railroad company shall be required to keep a flagman at such crossings, not protected by gates, as may be designated by the mayor from time to time, "whose duty it shall be to warn people of the approach of engines or trains by the waving of a red flag, so as to fully protect the public as to their persons and property." The testimony shows that there was a gate on each side of this Twenty-seventh street crossing, but that on account of the lessened travel between the hours of 12 o'clock midnight and 6 o'clock in the morning the gates were not used. It is argued by counsel for the railroad company that no flagman was required at this crossing, because it was a crossing where gates were used, and, in addition to that, that the mayor had never designated this crossing as one where a flagman was required. The testimony shows this latter contention to be true. But we do not think it was prejudicial error on the part of the court to admit this evidence over the defendant's objection, because the jury must have known that the mayor had never designated a flagman at this crossing, and therefore could not possibly have been misled to the prejudice of the defendant by

this evidence, and could not have considered that the company was negligent in failing to provide a flagman at this crossing on account of the fact that the mayor had designated it as one of the crossings where a flagman should be employed.

Again it is said that the court erred in refusing this tendered instruction: "In determining whether a reasonable person so going along Twenty-seventh street would have seen the switch-engine you may consider what other persons coming after the deceased along the same walk and line of travel did see in that regard." The refusal of the court was not error. The testimony of what others saw was in the record. It was a proper subject of argument to the jury. It had not been withdrawn from their consideration. The presumption is that, as reasonable men, they gave this testimony the same consideration, as jurors, that, as men, they would give it in deciding an important question outside of the jury-room. How could they overlook the fact that others saw the switch-engine moving? The writer of this opinion thinks it is a reflection upon a juror's intelligence to assume that he will overlook testimony unless it is specifically pointed out to him by the court, or will neglect to consider it unless told to do so. It is the duty of the attorneys to suggest these argumentative matters to the jury, not of the court.

Defendant requested the trial court to give two instructions, as follows:

"7. If in passing track No. 4, the second track south of the main line track, on which train No. 3 was approaching, the deceased, Riley, could have seen the conditions in time to have taken a position of safety with regard to track No. 3 as well as track No. 4, it was his duty, in the exercise of ordinary care, to have done this, and, if he did not, and his failure to do so caused his death, the plaintiff cannot recover in this action.

"8. Knowing that train No. 3 was approaching the passenger depot, and would cross the Twenty-seventh street crossing, he was bound to so conduct himself as to that train as not to put himself in a known place of danger while it was passing,

and, if reasonable prudence had required him to take a position to the southward of track No. 3 because of the slight space between it and the track on which the passenger train was coming, and he did not do so, and his failure to do this resulted in his being struck and killed, this of itself and alone would constitute contributory negligence, and demand a verdict for the defendant railway."

The fault of these instructions lies in the fact that they are not applicable to the evidence in the case. There is no evidence that the deceased assumed a position of known danger, or that the place where he was was not a place of safety, apparently, when he went into it. These proposed instructions omit any reference to the duty of the defendant to exercise ordinary care to protect the deceased in the position in which he was. The court fully covered the question of contributory negligence in other instructions.

Instruction No. 26, proposed by the defendant, reads as follows: "In any event, if Riley was at fault in putting himself in a position where a movement to avoid the dust of train 3 would bring him within striking distance of the switch-engine, there could be no recovery on the ground of the speed of train No. 3." The court refused to give the instruction, and the action is assigned as error. This instruction also omits the element of defendant's duty to take reasonable care to avoid injuring Riley in the position in which he placed himself.

It is insisted that the court erred in refusing to give defendant's instruction No. 29, which reads as follows: "I further instruct you that there is nothing in the evidence showing any traffic conditions or travel conditions between the hours of 2 A. M. and 4 A. M. of any day at the said Twenty-seventh street crossing requiring the operation of said gates during that time independently at [of!] law, ordinance, or regulation." If this instruction had been given, it would have withdrawn from the consideration of the jury a part of the evidence on the very question they were to decide, that is, whether the defendant exercised ordinary care in moving the switch-engine across Twenty-

seventh street, under the circumstances disclosed by the record. The question of what precautions were necessary to be observed in the exercise of reasonable care, under the circumstances, was for the jury to decide.

It is contended by the respondent that the deceased was justified in assuming that the crossing was safe because the gates were up; while the defendant claims that the fact of the gates being up is immaterial, because the deceased knew that No. 3 was about to cross the street. It is unnecessary to decide this point, because the jury had a right to consider that the gates were up, in deciding whether or not the defendant exercised ordinary care in moving the switch-engine under the circumstances that the gates were up and there was no watchman in the tower.

It was a question for the jury to decide whether the defendant, in the exercise of ordinary care, might have discovered the position of the deceased in time to have avoided injuring him, and this, whether the deceased had exercised ordinary care in going into the place where he was, or not. Upon a railroad company is imposed the duty of using all reasonable efforts to avoid injury to one who has accidentally placed himself in a position of danger, if the peril is known, or, under certain circumstances, by the exercise of reasonable care, might have been known. (See 1 Thompson on Negligence, sec. 239; 2 Thompson on Negligence, sec. 1596.)

But it is claimed by the appellant that the doctrine, if such it may be termed, of the last clear chance, cannot be invoked or relied upon by the plaintiff, because no such issue was raised by the reply. Counsel cite the case of *Orient Ins. Co. v. Northern Pacific Ry. Co.*, 31 Mont. 502, 78 Pac. 1036, in which this court held that in that particular case the defense of contributory negligence could not be relied upon as a basis for proposed instructions, because not pleaded in the answer. There may be cases where the claim that the defendant had the last clear chance to avoid the injury, being relied upon by the plaintiff as a basis for affirmative testimony in rebuttal, must be set forth in a re-

ply in answer to defendant's plea of contributory negligence. But in this case no such necessity arose. The only rebuttal testimony offered related to the deceased's condition, whether he was under the influence of liquor. All of the testimony relating to the last clear chance went in under the issues made by the complaint and answer, without objection. Under these circumstances the plaintiff could rely upon the so-called doctrine. It was a legitimate subject for argument to the jury, and of instruction by the court. (See *Nelson v. Boston & Mont. Con. C. & S. M. Co.*, 35 Mont. 223, 88 Pac. 785.) Not only that, but we think the claim that defendant had the last clear chance is comprehended within the specific allegations of the complaint, and that an inference in support of it may be gathered from all of the testimony.

We find no error in this case of which the defendant can complain. Conceding that technical errors were committed during the hurry of the trial, we find no prejudice to the defendant. Indeed, it seems to us that the learned trial judge was particularly careful and painstaking in the conduct of the trial, and, reading all of the instructions together, we do not feel that the defendant has reason to complain of any action of the court below. Affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY.
concur.

RUSH, RESPONDENT, v. LEWIS AND CLARK COUNTY ET AL., APPELLANTS.

(No. 2,486.)

(Submitted January 24, 1908. Decided February 18, 1908.)

[93 Pac. 943.]

Tax Deeds—Validity—Tax Sales—Statutory Provisions—Strict Construction—Counties—Competitive Bidders—Presumptions.

Tax Deeds—County—Competitive Bidder—Effect.

1. A tax deed which showed on its face that a county had been a competitive bidder at a sale for delinquent taxes, contrary to the provisions of section 3882 of the Political Code, is void.

Same—Recitals.

2. The recitals in a tax deed must show affirmatively that the county had a right to take the property and that it was not a competitive bidder at the sale.

Same—Statutes—Strict Construction.

3. A county cannot purchase lands at a tax sale unless authorized to do so by law, and the provisions of the statute relative to sales for delinquent taxes must be strictly pursued before the owner can be divested of title.

Same—Construction—In Whose Favor.

4. A tax deed must be construed most strongly against him who claims under it, and if one of two constructions will support the claim of the person whose property has been taken, the deed will be held invalid.

Same—Invalidity—Presumptions.

5. Where a tax deed showed its invalidity upon its face, in that the county had been a competitive bidder at the sale contrary to statute, the presumption that official duty had been regularly performed will not protect a grantee of the county, nor may in such a case the provisions of section 3897, Political Code, making tax deeds *prima facie* evidence of the fact, among other things, that the property was sold as prescribed by law, be relied upon.

Appeal from District Court, Lewis and Clark County; Henry C. Smith, Judge.

SUIT by T. C. Rush against Lewis and Clark county and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Messrs. McConnell & McConnell, for Appellants.

Mr. Massena Bullard, for Respondent.

HONORABLE GEORGE B. WINSTON, Judge of the Third Judicial District, sitting in place of MR. JUSTICE SMITH, delivered the opinion of the Court.

This action was commenced for the purpose of having canceled and set aside two tax deeds, issued to Lewis and Clark county, for one hundred and sixty acres of land situated in said county, each deed being for eighty acres, and also a deed from Lewis and Clark county to the defendant, O. W. McConnell, and a deed from the said McConnell and his wife, Annie S. McConnell, to the defendant, E. N. Hart, for the same property. The lands described in them were assessed to Samuel E. Richardson, the owner, for the year 1900. The tax not having been paid, publication was duly made that the lands would be sold by the county treasurer to satisfy the delinquency, with costs, penalties, etc., and on January 25, 1901, they were sold and struck off to the defendant, the county of Lewis and Clark. At the expiration of the three-year period of redemption the county caused to be executed to it two deeds, one of said deeds being to the lands in section 5, and the other, to the lands in section 8. Subsequently the county, at public auction, sold the same to the defendant, O. W. McConnell, who conveyed to E. N. Hart. The action was instituted by Catherine Richardson, who had received a deed from Samuel E. Richardson, her husband, on March 11, 1905. Catherine Richardson subsequently deeded the property to T. C. Rush, the respondent herein, who was afterward substituted as plaintiff in the action. There was tendered with the complaint a sum sufficient to pay all the demands which the defendants, or any of them, might have against the property on account of taxes, penalties, interest and charges paid thereon.

It is alleged that both the tax deeds are void for a number of reasons growing out of the proceedings had by the treasurer, the principal one of which may be stated as follows: That each of the deeds is void on its face, for that it appears from the

recitals therein that at the sale of lands for taxes delinquent for the year 1900, had by the treasurer of Lewis and Clark county on January 25, 1901, the county of Lewis and Clark became the purchaser of the lands in controversy as a competitive bidder; whereas, under the provisions of law applicable, it could not become a purchaser at all, but could only take them by having them struck off to it by the treasurer after they had been offered for sale at auction on successive days and there was no *bona fide* bidder for them.

The court found the issues for the plaintiff, adjudged the tax deeds and the subsequent conveyances void, and directed that they be canceled of record. The defendants have appealed from the judgment and an order denying them a new trial. Many assignments of error are made in appellants' brief, but these do not require notice, for the reason that we are of the opinion that the tax deeds are void because of the recitals referred to, and that the judgment of the district court must therefore be affirmed.

The deeds are identical in every respect, except in the description of the property. The deed for the lands in section 5 recites: "That at said auction Lewis and Clark county was the bidder who was willing to take the least quantity or the smallest portion of the said land and pay the taxes, costs, and charges due thereon, which taxes, costs, and charges amounted to the sum of seven and 32/100 dollars; that the said least quantity or smallest portion of the said land, lying and being within the said county of Lewis and Clark, state of Montana, described as follows, to wit, land S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$, 80 acres in sec. 5, Tp. 12 N., R. 5 W., was by the said William Steele, as county treasurer aforesaid, struck off to the said Lewis and Clark county, who paid the full amount of the said taxes, costs, and charges, and thereby became the purchaser of the last described piece or parcel of land," etc.

Section 3882 of the Political Code provides, among other things, how the county may acquire property "struck off" to it for delinquent taxes, as follows: "• • • But in case there is no purchaser in good faith for the same, as provided in this

chapter, on the first day that the property is offered for sale, then when the property is offered thereafter for sale and there is no purchaser in good faith for the same, the whole amount of the property assessed must be struck off to the county as the purchaser, and the duplicate certificate delivered to the county treasurer and filed by him in his office." This section prohibits the county from becoming a competitive bidder at the sale of property for delinquent taxes, and it can only acquire it when there is no other purchaser in good faith; and the recitals in the deed must show the right of the county to take the property, and that it did not enter the lists as a competitive bidder for the same. Unless the recitals of the deed show these things, or if the deed recites, as does the deed in question, matters showing that the county was a competitive bidder at the sale, the deed on its face is void. (*Norton v. Friend*, 13 Kan. 532; *Magill v. Martin*, 14 Kan. 67; *Babbitt v. Johnson*, 15 Kan. 252; *Larkin v. Wilson*, 28 Kan. 513; *Hanenkratt v. Hamil*, 10 Okla. 219, 61 Pac. 1050; *Keller v. Hawk* (Okla.), 91 Pac. 778.)

The county cannot purchase lands at a tax sale unless authorized to do so by statute, and a strict compliance with the statute must be had before the title of the owner can be divested, and the conduct of those vested with the power to sell lands for delinquent taxes must be closely scrutinized, in order that there may be some security for property rights. The officer who makes the sale sells that which he does not own. The proceedings are to a large extent *ex parte*, the owner is an unwilling party, is seldom, if ever, present at the sale, is generally ignorant of it, and the tax almost always bears a very small proportion to the value of the property sold. Upon these considerations it has generally been held that proceedings on tax sales should strictly comply with the statute; and this is the construction of the law recently applied by this court in the case of *North Real Estate L. & T. Co. v. Billings L. & T. Co.*, 36 Mont. 356, 93 Pac. 40.

Counsel for appellants contend that the presumption that official duty has been regularly performed and that the law has

been obeyed, as well as the provisions of section 3897 of the Political Code, making tax deeds *prima facie* evidence of certain matters, should protect the purchaser at a tax sale. But they cannot prevail against the presumption which must be drawn from the wording of the deed; and, where two presumptions may be drawn therefrom, that one must be indulged which is most favorable to the owner of the property. A tax deed must be construed most strongly against him who claims under it, and, if one of two constructions will support the claim of the citizen, the deed must be held invalid. When we look at the recitals of the deeds before us, and apply to them this rule of construction, it is apparent that the county became a competitive bidder, and that each of them is void on the face. The tax deeds, the foundation of defendant Hart's title, being void, it necessarily follows that the subsequent conveyances under which he claims title are also void.

For these reasons, we think the judgment of the lower court should be affirmed; and it is so ordered.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing granted March 28, 1908, on the questions: What significance, if any, attaches to the recitals in the tax deeds touching the method by which the county obtained title to the lands in controversy? Are these recitals surplusage or not?

PARNELL, RESPONDENT, v. DAVENPORT ET AL., APPELLANTS.
(No. 2,506.)

30 571
p.39 560

(Submitted February 18, 1908. Decided February 25, 1908.)

[93 Pac. 939.]

Choses in Action—Assignment—Consideration—Joint Appeal—Effect.

Choses in Action—Assignment—Duebills.

1. Defendants were assignees of moneys to be made out of certain wood contracts. Plaintiff, an employee of the assignor, procured from the latter an order on defendants for wages due him. On presentation of the order defendants took an assignment from plaintiff of all moneys due him for wages, and paid part of the order in cash and gave him a duebill for the balance. In an action on the duebill, *held*, that the transaction between plaintiff and defendants amounted to an assignment of a chose in action, and that judgment for plaintiff was proper.

Same—Consideration.

2. The promise to pay the duebill referred to in the foregoing paragraph was supported by a sufficient consideration, under sections 2160, 2161, Civil Code, since by taking plaintiff's assignment of wages due him, defendants gained the advantage of having his possible statutory lien out of the way of asserting their claim under the employer's assignment to them.

Joint Appeal—Effect.

3. Where two defendants jointly moved for a new trial, the question, raised by one, that the evidence was insufficient to sustain the verdict as against him, will not be considered on appeal.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Samuel Parnell against J. R. Davenport and the Davenport Company on a duebill. From an order denying defendants' motion for a new trial, they appeal. Affirmed.

Mr. John A. Smith, for Appellants.

Mr. T. F. Nolan, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1905, F. W. Warnock had a contract with the Original Mining Company to supply certain mining timbers, which he

procured in Jefferson county and shipped to the company in Butte. In order to prosecute his work, Warnock borrowed money from the appellant, the Davenport Company, and as partial security for such loan assigned to the Davenport Company the moneys due him each month for timber sold to the Original Mining Company. Parnell, the plaintiff and respondent, was employed by Warnock in cutting and preparing these mining timbers. On December 12, 1905, Warnock executed and delivered to Parnell the following order:

"Warnock's Camp, Dec. 12, 1905.

"J. R. Davenport:

"Please pay to Samuel Parnell the sum of one hundred and twenty-seven and 58/100 (\$127.58) dollars, in full payment to date, and charge the same to my account, and greatly oblige.

"F. W. WARNOCK."

This order Parnell took to the Davenport Company, and received from the company \$75 in cash and the following duebill:

"December 14, 1905.

"Due Sam Parnell \$52.58 on Warnock account, to be paid in January.

"J. R. DAVENPORT."

Demand having been made for the payment of the amount represented by this duebill, and payment having been refused, Parnell commenced this action to enforce payment as for a balance due on an account assigned to J. R. Davenport and the Davenport Company.

The joint answer of the defendants admits the execution, delivery, and presentation of the Warnock order, and the payment by the Davenport Company of \$75, but alleges that the promise to pay the balance was made upon condition that sufficient funds from Warnock should come into the hands of Davenport or the Davenport Company; and it is further alleged that there were not any funds whatever from Warnock received by either of the defendants from which such payment could be made. An

attempt was also made to plead a counterclaim; but the allegations are insufficient for that purpose, and there is not any contention made here with reference to that so-called counterclaim.

The case was commenced in a justice of the peace court, where plaintiff had judgment. The defendants appealed to the district court, where the case was tried to the court sitting with a jury. A verdict was returned in favor of the plaintiff, and a judgment rendered and entered thereon. From an order denying defendants a new trial, this appeal was taken.

We think the liability of the defendant Davenport Company was properly fixed by the judgment in this case. Taking the defendants' own theory of the transaction, as disclosed by the testimony of J. R. Davenport, a witness for the defendants, and it seems to us that a different conclusion could scarcely be reached. That testimony discloses the business relations between Warnock and the Davenport Company. It further discloses that, when Parnell presented the Warnock order, an assignment of all moneys due from Warnock was taken by the Davenport Company, \$75 paid in cash, and the duebill representing the balance given. It is entirely immaterial, then, what particular designation be given to the Warnock order, since it is manifest that the transaction between Parnell and the Davenport Company amounted to an assignment of a chose in action by Parnell to that company. (Civ. Code, secs. 1350, 1351.)

But it is said that there was not any consideration for the promise on the part of the Davenport Company to pay the balance represented by the duebill. With this we do not agree. Other matters aside, it is apparent that Parnell by such assignment waived his right to a statutory lien, while the Davenport Company gained the advantage of having such lien out of the way of asserting its claim to moneys which would accrue to Warnock from the sale of mining timbers prepared by Parnell, and which moneys the Davenport Company could claim under its assignment from Warnock, provided a lien upon the timbers was not asserted. Under these circumstances we deem the consideration sufficient. (Civ. Code, secs. 2160, 2161.)

There is some conflict in the evidence as to whether the promise to pay the balance represented by the duebill was an absolute or a conditional promise; but by the general verdict that controversy was settled in favor of plaintiff's contention that it was an absolute one.

Whether the evidence is sufficient to sustain the verdict as against J. R. Davenport need not be considered. The motion for new trial was a joint motion, and the notice of appeal was a joint notice. In 1 Spelling on New Trial and Appellate Procedure, section 372, it is said: "A party having ground for a new trial may lose the benefit of it by proceeding jointly with a party not so favorably situated with reference to the proceeding; and, where there is any doubt as to the identity of relation or equality of rights therein, a separate notice should be given, though they be represented by the same attorney." (*Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994.)

The order from which this appeal is taken is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

36	574
38	105
38	363
38	382

36	574
40	463
40	497
40	522

BIRSCH, RESPONDENT, v. CITIZENS' ELECTRIC CO., APPELLANT.

(No. 2,482.)

(Submitted February 18, 1908. Decided February 25, 1908.)

[93 Pac. 940.]

Personal Injuries—Electric Wires—Contributory Negligence—Pleadings—Burden of Proof—Negligence—Proximate Cause.

Personal Injuries—Contributory Negligence—Pleadings.

1. To make the defense of contributory negligence available to defendant, it must be specially pleaded, unless such negligence appears from the allegations of the complaint, or unless plaintiff's own case raises a presumption of it.

Same—Insufficiency of Pleading.

2. Since contributory negligence on the part of plaintiff in a personal injury action presupposes negligence on the part of defendant, an answer which denies any negligence on defendant's part and alleges that the injury complained of resulted wholly from plaintiff's own negligence, is insufficient to plead contributory negligence.

Same—Negligence—Definition.

3. The definition of negligence as being "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done," approved.

Same—Electricity—Negligence—Presumptions.

4. Plaintiff while working as a hodcarrier on a scaffold, made wet by rain, stepped on a mortar board and slipped. He threw out his hands and in doing so came in contact with defendant company's wire, heavily charged with electricity, causing him to become insensible and fall to the ground on a pile of rocks. *Held*, that under this condition of the evidence it cannot be said that plaintiff's own case raised a presumption of contributory negligence, so as to relieve defendant from pleading it, but that the only fair inference deducible would seem to be that his slipping was an accident and the throwing out of his hands a purely involuntary act.

Same—Contributory Negligence—Burden of Proof.

5. Where, in an action for personal injuries, contributory negligence is properly pleaded as a defense, the burden of proving it rests upon defendant, and plaintiff is not called upon to show that his own heedlessness was not the cause of his injury.

Same—Electricity—Negligence—Proximate Cause—Question for Jury.

6. The question whether an electric company's negligence in failing to properly insulate an electric wire, which was heavily charged with electricity and with which plaintiff, a hodcarrier, while working on a scaffold in close proximity to the wire, in slipping accidentally came in contact, was the proximate cause of injuries sustained by plaintiff in falling upon a pile of rocks, was one for the jury.

Same—Electricity—Negligence per se—Presumptions.

7. Where a workman, while working on a wet scaffold, slipped and in throwing out his hands came in contact with an electric company's live wire and was injured, the accidental slipping cannot be said to be negligence per se on his part, since the law presumes that plaintiff exercised ordinary care in the premises.

Same—Electricity—Negligence—Proximate Cause.

8. Where the primary cause of a personal injury was plaintiff's accidental slipping on a scaffold used in the erection of a building, and the negligence of an electric company in failing to have a live wire properly insulated was the co-operating or culminating cause of the injury sustained by plaintiff in coming in contact with it, he being rendered insensible and falling upon a pile of rocks, the negligence of the company was the proximate cause of the injury.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

ACTION by Joseph Birsch against the Citizens' Electric Company. From a judgment for plaintiff, and an order denying it a new trial, defendant appeals. **Affirmed.**

Mr. M. S. Gunn, and Mr. Rudolf Von Tobel, for Appellant.

Citing: *Elliot v. Allegheny Light Co.*, 204 Pa. St. 568, 54 Atl. 278; *Bessey v. Newichawanick Co.*, 94 Me. 61, 46 Atl. 806.

Mr. Frank E. Smith, and Mr. J. C. Huntoon, for Respondent.

Citing: *Goe v. Northern Pac. R. R. Co.*, 30 Wash. 654, 71 Pac. 183; *Walters v. Denver Con. El. Lt. Co.*, 12 Colo. App. 145, 54 Pac. 960; *Hampson v. Taylor*, 15 R. I. 83, 85, 8 Atl. 331, 23 Atl. 732; *Burian v. Seattle El. Co.*, 26 Wash. 606, 67 Pac. 214; *Griffin v. United Elec. Co.*, 164 Mass. 492, 49 Am. St. Rep. 477, 41 N. E. 675, 32 L. R. A. 400; *Perham v. Portland Gen. E. L. Co.*, 33 Or. 451, 72 Am. St. Rep. 730, 53 Pac. 14, 40 L. R. A. 799; *McLaughlin v. Louisville E. L. Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; *Bourke v. Butte El. L. & P. Co.*, 33 Mont. 267, 83 Pac. 470; *Neal v. Rendall*, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 668; *Stevens v. United Gas & L. Co.*, 73 N. H. 159, 60 Atl. 848, 70 L. R. A. 119; *Brown v. Edison Co.*, 90 Md. 400, 78 Am. St. Rep. 442, 45 Atl. 182, 46 L. R. A. 745.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action for damages for personal injuries. The plaintiff was employed as a hodcarrier and mason's helper in the construction of a building for the Bank of Fergus County. At the time the plaintiff received his injuries, one wall of the building had been erected to a height of more than twenty feet. Scaffoldings were built against this wall for the use of the workmen; the second of these scaffolds being about twenty to twenty-two feet above the ground. The defendant electric company had certain wires strung on poles within three or four feet of this wall; the topmost wire being about two feet above the second scaffold, which scaffold was about two and one-half feet wide. This topmost wire carried an electro-motive force of about six thousand volts. On the day of the injury, the plain-

tiff was directed by a mason to move certain mortar from a mortar board at one end of the second scaffold to a mortar board at the other end of the same scaffold. It was raining, and the scaffold, boards, and tools were wet. In the act of performing his work the plaintiff stepped upon the mortar board and slipped. Apparently he involuntarily threw out his hands to save himself or restore his equilibrium, when his left forearm came in contact with the heavily charged wire. He became at once insensible and fell to the ground and upon a pile of rocks. The result of his contact with the wire was a burn on his left arm and a shock to his nervous system. His fall upon the pile of rock resulted in broken ribs, an injured shoulder, and other wounds and bruises. He commenced this action to recover damages, and charged the defendant electric company with negligence in maintaining the wire in close proximity to the building without having it sufficiently insulated, and with having it charged with a high and dangerous current of electricity.

The answer consists of a denial of most of the material allegations of the complaint. It also contains the following paragraph: "(6) That if plaintiff was injured at the time alleged, or at any other time, by coming in contact with one of the defendant's wires charged with electricity, such injury was wholly due to plaintiff's own neglect, and was not in any way due to any negligence on the part of defendant, or of any of its officers."

To the affirmative allegations of the answer the plaintiff replied. The cause was tried to the court sitting with a jury. A verdict was returned in favor of the plaintiff, and judgment was rendered and entered thereon, from which judgment, and an order denying it a new trial, the defendant appeals.

The appellant makes three assignments of error, but in the opening paragraph of its brief its counsel tersely say: "The first contention of appellant is that the negligence complained of was not the proximate cause of the injuries sustained by plain-

tiff. All the errors specified are based upon this contention, and the contention that plaintiff was guilty of contributory negligence." We have, then, for consideration, as counsel have outlined, but two questions, and these, stated in the reverse, are (1) Was the plaintiff guilty of contributory negligence? and (2) Was the negligence of the defendant the proximate cause of plaintiff's injuries?

1. Objection is made to a consideration of the first question, upon the ground that the defense of contributory negligence is not pleaded in the answer. It is a rule, now well established in this state, that the defense of contributory negligence, in order to be available to the defendant, must be specially pleaded (*Pryor v. City of Walkerville*, 31 Mont. 618, 79 Pac. 240; *Orient Ins. Co. v. Northern Pac. Ry. Co.*, 31 Mont. 502, 78 Pac. 1036, and cases cited), unless such contributory negligence appears from the allegations of the complaint (*Nord v. Boston & Mont. Con. C. & S. Min. Co.*, 33 Mont. 464, 84 Pac. 1116), or unless the plaintiff's own case raises a presumption of contributory negligence (*Nelson v. Boston & Mont. Con. C. & S. Min. Co.*, 35 Mont. 223, 88 Pac. 785).

The only attempt made to plead contributory negligence is found in the paragraph of the answer quoted above, and that the allegations of that paragraph are insufficient is apparent. In the paragraph it is alleged that plaintiff's injury was wholly due to his own negligence, and was not in any way due to the negligence of the defendant. Contributory negligence on the part of plaintiff presupposes negligence on the part of the defendant. (Beach on Contributory Negligence, 2d ed., sec. 64; *Wastl v. Montana Union Ry. Co.*, 24 Mont. 159, 61 Pac. 9.) "Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." (7 Am. & Eng. Ency. of Law, 2d ed., 371.) This definition is approved in *Moakler v. Willamette V. R. Co.*, 18 Or. 189, 17 Am. St. Rep.

717, 22 Pac. 948, 6 L. R. A. 656, and *Montgomery G. L. Co. v. Montgomery & E. Ry. Co.*, 86 Ala. 372, 5 South. 735. In *Washington v. Baltimore & O. R. R. Co.*, 17 W. Va. 190, it is said: "Properly speaking, contributory negligence, as the very words import, arises when the plaintiff as well as the defendant has done some act negligently, or has omitted through negligence to do some act, which it was their respective duty to do, and the combined negligence of the two parties has directly produced the injury."

It goes without saying, then, that an answer which denies any negligence on the part of the defendant, and alleges that the injury resulted wholly from plaintiff's negligence, does not plead contributory negligence; and the defendant, having failed to plead contributory negligence, cannot rely upon it, unless this case falls within one of the two exceptions noted above. It does not fall within the first exception, for the complaint alleges: "That the said injuries complained of herein were caused by the gross negligence of the defendant, its agents and servants; that the said plaintiff was entirely without negligence on his part."

Does the case then fall within the second exception, or, in other words, did the plaintiff's own case raise a presumption of contributory negligence? In their brief counsel for appellant say: "The evidence conclusively establishes the fact that the plaintiff was guilty of contributory negligence. He fell onto the wire by reason of his own heedlessness and carelessness." The testimony tends to show that the plaintiff stepped on the mortar board and slipped; that he threw his hands out, and in so doing his left arm came in contact with the wire. The only fair inference deducible would seem to be that his slipping was an accident, and the throwing out of his arms a purely involuntary act. In *Baltimore etc. R. R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506, negligence is defined as follows: "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done." We approve this definition, and under its terms we

cannot see how it can be said that the plaintiff's case raised a presumption of his negligence.

Appellant's counsel cite *Bessey v. Newichawanick Co.*, 94 Me. 61, 46 Atl. 806. Just how this case was tried does not appear clearly from the report, but the opinion is prefaced with this observation: "The essential facts in this case are not really in dispute, but only the inferences to be fairly deduced therefrom. To the court, by agreement of the parties, is left the decision of the case upon both the law and the fact." Counsel quote the concluding paragraph of the opinion as follows: "We feel forced, above all else, to the conclusion that whether defendant was or not in any fault, actual or theoretical merely, the case fails to show that the plaintiff's own heedlessness was not the great cause of the accident." This would seem to indicate that a rule prevails in Maine different from that recognized here. In a case of this character the plaintiff does not assume the burden of proving the negative; that is, he is not called upon to show that his own heedlessness was not the cause of his injury. On the contrary, the burden is upon the defendant to show the affirmative; that is, that the injury resulted from plaintiff's heedlessness as a contributing cause, where contributory negligence is properly pleaded. The authority cited above would be applicable if this case belonged to the class of which *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21, is an example; but it does not.

2. Was the negligence of the defendant the proximate cause of plaintiff's injury? We are not prepared to say that appellant is not correct in contending that "the only injury resulting from the wire was the burn on the wrist and a shock. The broken shoulder blade, broken ribs, and other injuries are attributable to the fall on the rocks." It is difficult to determine from the record whether the plaintiff would have fallen to the ground in any event, whether he came in contact with the wire or not. But it is a fact that he came in contact with the wire, was rendered insensible and helpless, and that he did fall to the ground and upon the pile of rocks. The trial court had the witnesses before it, observed their demeanor, and apparently had the ad-

vantage of seeing the illustrations made by the plaintiff as to his situation when he came in contact with the wire, which we have not; and it may be that, if the defendant had requested the trial court to withdraw from the consideration of the jury all testimony relating to the injury resulting from his coming in contact with the pile of rocks, the request would have been granted; but such a request was not made, and it is not contended that the verdict is excessive. In order to coincide with appellant's view, we would have to say that the plaintiff was not entitled to recover anything, and this we cannot do.

So far as the injuries received by plaintiff from coming in contact with the wire directly are concerned, we think it is a fair inference from the evidence that the negligence of the defendant was the proximate cause thereof. At least we are satisfied that it was a matter properly submitted to the jury for its determination. This is the holding of the supreme court of Massachusetts in *Griffin v. United Electric Light Co.*, 164 Mass. 492, 49 Am. St. Rep. 477, 41 N. E. 675, 32 L. R. A. 400, a case somewhat similar in its facts. Certainly, it cannot be said that plaintiff's accidental slipping was *per se* negligence on his part. In this state the law presumes that the plaintiff exercised ordinary care. (Code Civ. Proc., sec. 3266, subd. 4.)

We think it may be said to be the general rule, sustained by the great weight of authority, that "where the primary cause of an injury is a pure accident, occasioned without fault of the injured party, if the negligent act of the defendant is a co-operating or culminating cause of the injury, or if the accident would not have resulted in the injury excepting for the negligent act, the negligence is the proximate cause of the injury, for which damages may be recovered." (*Goe v. Northern Pac. Ry. Co.*, 30 Wash. 654, 71 Pac. 182.) This doctrine has been directly recognized and applied in this state. (*Lundeen v. Livingston E. L. Co.*, 17 Mont. 32, 41 Pac. 995; *Cannon v. Lewis*, 18 Mont. 402, 45 Pac. 572.) In *Meisner v. City of Dillon*, 29 Mont. 116, 74 Pac. 130, the same rule is stated as follows: "Where two causes contribute to an injury, one of which is directly traceable

to the defendant's negligence, and for the other of which neither party is responsible, the defendant will be held liable, provided the injury would not have been sustained but for such negligence." Counsel for appellant cite *Elliott v. Allegheny County Light Co.*, 204 Pa. St. 568, 54 Atl. 278, which seems to be somewhat in conflict with the rule just stated; but we do not see any reason for departing from the former holdings of this court.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STATE, RESPONDENT, v. NORTHERN PACIFIC RY. CO.,
APPELLANT.

(No. 2,524.)

(Submitted February 18, 1908. Decided February 25, 1908.)

[93 Pac. 945.]

Railroads—Interstate Commerce—Regulation of Hours of Labor
—Power of Legislature—Statutes.

**Railroads—Interstate Commerce—Regulating Hours of Labor—Power of
Legislature—Constitution.**

1. In the absence of legislation by Congress on the matter of regulating the hours of labor, etc., of certain railway employees in this state, even though engaged in interstate commerce, such regulation was a matter of state control under the exercise of its police power; hence the Act of February 5, 1907 (Laws 1907, p. 6), making such provision and providing penalties for violation thereof, was not an attempt to regulate interstate commerce in contravention of the federal Constitution.

Same—Federal and State Statutes on Same Subject—Effect.

2. The Act of February 5, 1907 (Laws 1907, p. 6), regulating the hours of labor, etc., of certain railway employees in this state was not rendered inoperative by the enactment of a similar statute by Congress, approved March 4, 1907, which, however, was not to become effective until March 4, 1908; but, in the absence of any declaration by Congress indicating the intention to at once supersede existing state legislation on the subject, the state law remained in full force until the federal Act went into effect.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by the state of Montana against the Northern Pacific Railway Company. From a judgment for plaintiff, and an order denying it a new trial, defendant appeals. Affirmed.

Mr. R. F. Gaines, Mr. J. G. Brown, and Mr. Wm. Wallace, Jr., for Appellant.

Mr. Albert J. Galen, Attorney General, and Mr. E. M. Hall, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant is a corporation, organized under the laws of the state of Wisconsin, and is engaged in operating a line of railroad from a point on the shore of Lake Superior, through Montana and other states, to a point on the shore of Puget Sound. In the conduct of its business as a common carrier it transports passengers and freight from points without to points within the state of Montana, from point to point within the state, and from points within to points without the state. On January 9, 1908, the attorney general filed an information in the district court of Lewis and Clark county, charging, in substance, that on or about December 30, 1907, the defendant, while engaged in the transportation of freight in the usual course of its business in said county, did willfully, intentionally, and unlawfully permit and require certain of its employees, being its engine and train crews in charge of one of its freight trains, to labor in the operation thereof for more than sixteen consecutive hours, to-wit, for twenty-three consecutive hours, there being no particular occasion by reason of accident, storm, wreck, washout, unavoidable delay, or other like cause, permitting or requiring said employees to so labor. The charge was preferred

under the provisions of the Act of the Tenth Legislative Assembly, approved February 5, 1907 (Laws 1907, p. 6), entitled, "An Act to regulate the hours of labor of locomotive engineers, locomotive firemen, conductors, trainmen, operators and agents acting as operators, and to provide penalties and civil liabilities for the violation thereof." To the information the defendant interposed a general demurrer. This having been disallowed, it entered its plea of not guilty. At the trial counsel submitted an agreed statement of facts, embodying substantially the allegations in the information. The defendant was found guilty, and was sentenced to pay a fine. It has appealed from the judgment and an order denying it a new trial.

It is not questioned that the information is sufficient, in form and substance, to state an offense, if the statute is a valid exercise of legislative power. The contention is that the judgment cannot be sustained because the legislation is invalid, in that (1) it is an attempt to regulate interstate commerce, the power to do which is vested by the federal Constitution exclusively in the Congress of the United States; and (2), even though it was a valid exercise of power at the time of its enactment, it became invalid and inoperative upon the passage of the Act of Congress, approved March 4, 1907, dealing with the same subject. (34 Stats. at Large, 1415.)

Section 1 of the Act declares: "On all lines of steam railroads or railways operated in whole or in part within this state the time of labor of locomotive engineers, locomotive firemen, conductors, trainmen, operators and agents acting as operators, employed in running or operating the locomotive engines or trains on or over such railroads or railways in this state, shall not at any time exceed sixteen (16) consecutive hours or to be on duty for more than sixteen (16) hours in the aggregate in any twenty-four (24) hour period. At least eight (8) hours shall be allowed them off duty before said engineers, firemen, conductors, trainmen, operators and agents acting as operators, are again ordered or required to go on duty; provided, however, that nothing in this section shall be construed to allow any

engineer, fireman, conductor or trainman to desert his locomotive or train in case of accident, storms, wrecks, washouts, snow blockade or any unavoidable delay arising from like causes, or to allow said engineer, fireman, conductor or trainman to tie up any passenger or mail train between terminals." Section 2 prescribes penalties and imposes civil liabilities for violations of these provisions. Section 4 repeals conflicting legislation, and section 5 declares the Act immediately operative.

1. Upon the first proposition the argument is that the grant of power to Congress under the federal Constitution "to regulate commerce * * * among the several states * * *" is exclusive; and since the defendant is, and at the time the alleged offense was committed was, engaged in interstate commerce, and the Act in question assumes to impose burdens and restrictions upon it in the transaction of its business in this connection, as well as upon that done exclusively between points within the state, the Act is the result of an unwarranted assumption of power by the legislature.

The purpose of the legislature in the enactment of this statute was to secure better service at the hands of all persons operating lines of railroad within or through this state, and at the same time to promote the safety of the lives and property intrusted to them. It is apparent to everyone that a continuance beyond a reasonable time each day in the performance of the exacting duties incident to an employment that is always attended with danger tends to impair both the health and efficiency of employees, and should not be permitted except in cases of necessity. The legislature was seeking, then, by an exercise of the police power of the state, not only to serve the general welfare of the public, but also to preserve the lives and health of all persons employed in, or having direct connection with, the running of trains. Now, the police power is inherent in the several states. It remains with them notwithstanding the grant of power by them to the federal government, and may be exercised by their several legislatures upon all matters coming within its purview, without limitation or restriction. (*Lake*

Shore & Michigan Southern Ry. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; 22 Am. & Eng. Ency. of Law, 2d ed., 919.) When, however, the state undertakes to legislate upon the general subject of commerce, the distinction between what is local and what is national in character must be kept in mind.

In *Covington etc. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962, the supreme court of the United States distinguishes the subjects of legislation in this connection into three classes: (1) Those over which the power of the state is exclusive; (2) those in which the state may act in the absence of legislation by Congress; and (3) those over which the power of Congress is exclusive, and the state cannot interfere at all. It is pointed out that in the first class fall many subjects of legislation which may affect interstate commerce indirectly, but their bearing upon it is of a local character so remote that they cannot be deemed in any just sense an interference. In the second class are embraced laws for the regulation of pilots employed upon navigable rivers over which the federal government has jurisdiction; quarantine and inspection laws and the policing of harbors; the improvement of navigable channels; the regulation of wharfs, piers, and docks; the construction of dams and bridges across navigable streams and the establishment of ferries. Citing and quoting with approval from the decision in *Cooley v. Philadelphia Port Wardens*, 12 How. (U. S.) 299, 13 L. Ed. 996, the conclusion is announced that on all these subjects the states are free to legislate, so long as the effect is to control matters local in character only, until Congress chooses to act, though such legislation indirectly affects commerce with foreign nations and between the states. In the third class fall all those subjects of legislation which are not local in their nature, and do not affect interstate commerce incidentally only, but are national in their character. Over all such subjects Congress has exclusive power, and, in so far as

it refrains from acting upon them, it indicates its will that in these respects commerce shall be free from regulation.

In the case of *Cooley v. Philadelphia Port Wardens*, one of the questions decided was whether an Act of the legislature of Pennsylvania, regulating pilots and pilotage, was repugnant to the commerce clause of the Constitution. It was held that, though Congress had the power to deal with the subject, the mere grant of the power did not amount to a denial of it to the state, and hence that the Act was valid until it should be superseded by an Act of Congress.

Statutes like the one before us, have often been drawn in question before the courts, and they have invariably been held valid by the highest court of last resort, except when they were clearly unreasonable interferences with interstate commerce. Cases holding such laws valid are collected by Mr. Justice Brown, in *Cleveland, C. C. & St. L. Ry. Co. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868, who makes the following summary: "We have recently applied this doctrine to state laws requiring locomotive engineers to be examined and licensed by the state authorities (*Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508); requiring such engineers to be examined from time to time with respect to their ability to distinguish colors (*Nashville etc. Ry. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352); requiring telegraph companies to receive dispatches and to transmit and deliver them with due diligence, as applied to messages from outside the state (*Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105); forbidding the running of freight trains on Sunday (*Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166); requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations (*Railway Co. v. Fuller*, 17 Wall. 560, 21 L. Ed. 710); forbidding the consolidation of parallel or competing lines of railway (*Louisville & Nashville R. R. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849); regulating the heat-

ing of passenger-cars, and directing guards and guard-posts to be placed on railroad bridges and trestles and the approaches thereto (*New York etc. R. R. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853); providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers which would have existed if no contract had been made (*Chicago etc. Ry. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688); and declaring that, when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent (*Richmond & Allegheny R. R. v. Patterson Tobacco Co.*, 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759). In none of these cases was it thought that the regulations were unreasonable, or operated in any just sense as a restriction upon interstate commerce."

In the Illinois case, a statute requiring railway companies to stop all trains at all county seats was held to be direct interference with interstate commerce, and therefore unconstitutional, but the Ohio case (*Lake Shore & Michigan Southern Ry. Co. v. Ohio*, *supra*) is distinguished and the result approved. Among the numerous decisions by this court some are found which seem to be out of line with others, but generally the rule has been observed that upon all such subjects, if Congress has not acted, the states are free to legislate, so long as they seek to promote the public safety and convenience, and do not undertake to hamper unnecessarily or substantially control the agencies of interstate commerce in the conduct of their business. In *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, *supra*, a statute of Ohio requiring each railway company to stop three of its trains, going each way, daily except Sundays, at all stations, cities, or villages containing over three thousand inhabitants, to receive and let off passengers, was upheld on the

ground that it was a proper exercise of police power by the state, and, though the decision was by a divided court, the doctrine of the cases cited by Mr. Justice Brown, in *Cleveland, C., C. & St. L. Ry. Co. v. Illinois*, was approved. In this connection the case of *Hennington v. Georgia* is also in point, though it is disapproved by the dissenting justices in the Ohio case.

On principle, we cannot distinguish between the effect of a statute such as that of the state of Alabama, which was considered in *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 512, and the one here involved. In that case, in order to secure the maximum of efficiency in railroad engineers, they were required to submit themselves to an examination to test their mechanical skill and knowledge, and to be licensed by a competent board of examiners, before they could be employed by any railway company. An additional requirement was that they must be men of careful and temperate habits. The statute in question applied generally to the business of railroads, without making any distinction between that which was strictly interstate commerce and that which was commerce within the state exclusively. So in *Nashville C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352, and for the same reason, all employees having charge of or directly connected with the operation of trains were required to submit themselves from time to time to examination to test their ability to distinguish color signals, and to obtain a license certifying to their efficiency in this regard, before they could enter or continue in the service of any railroad operating in the state.

The mechanical efficiency or personal habits of engineers, or their capacity or that of other railway employees to distinguish colors, and hence their greater efficiency in the business of handling trains, does not more nearly concern the public safety than does the necessity for sleep and rest, in order that they may have full possession of their mental powers and physical strength to aid them in the performance of their responsible duties. Nor does the requirement in the one case more seriously interfere with or restrain commerce than in the other. In all such cases

an additional burden is imposed upon the railroad corporation, and to the extent of this additional burden there is an interference with the conduct of its business.

The cases cited, it seems to us, are conclusive; and, while we think it properly conceded that the subject, so far as it affects interstate commerce, falls within the power of federal legislation under the Constitution, yet, in the absence of such legislation on the subject, it is a matter for state control, under the exercise of its police power, to provide for the public safety and also for the health and lives of railroad employees themselves.

2. It remains to inquire whether the law is still operative, notwithstanding the Act of Congress, referred to above, deals with the same subject. The state statute became a law on February 5, 1907. The federal statute does not by its own terms become operative until March 4, 1908. This being the situation, did it upon its approval invalidate the state statute, on the theory that it is a direct utterance of Congress under its constitutional power upon the same subject? The two Acts embody substantially the same provisions, and it is clear that it was the intention of Congress to assume control of the subject, so far as it concerns companies engaged in interstate commerce. Counsel for appellant cite no authority in support of their contention, nor do we know of any directly in point. It seems to us, however, that in the absence of some declaration on the subject in the Act itself, indicating the intention to supersede at once existing state legislation, there is no foundation in reason for the assertion that an Act, to take effect in the future, has that effect.

In *Smith v. Alabama*, *supra*, it is said: "But for the provisions on the subject found in the local law of each state, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employed him, or, if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed

to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular state does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which until displaced covers the subject." While the above quotation is not directly in point, it seems to lend support to the notion that, until legislation by Congress upon any subject upon which the state has concurrent jurisdiction becomes operative, the existing state legislation is not displaced, but in the interim remains in full force, especially so in the absence of any declaration by Congress on that subject. The case of *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819, seems also to support this conclusion.

We do not see how an Act which does not by its own terms become a rule of conduct until a future time, can be said to displace another existing rule on the same subject during the interval between the time of its enactment and the time it becomes operative, even though the existing rule be inconsistent with it, in the absence of some express or implied declaration of a purpose that such shall be the result. Legislation is not effective for any purpose until it becomes operative. In a given case the effective operation of a statute requiring expensive preparation, or a change in the mode of conducting business on the part of those whom it is intended to affect, may very properly be deferred to a future time. So far as it provides for such adjustment and changes, it may be said to have a quasi operative effect; but even in such cases the existing law must be regarded as remaining in force until it is actually displaced by the new one. The Act of Congress contains no such declaration, and we hold that the state statute, which was valid and in

force at the time of its passage, remains in force until the Act of Congress becomes effective.

We are of the opinion that there is no merit in either of the contentions made by the appellant. Consequently the judgment and order denying a new trial must be affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

WEIDENAAR, RESPONDENT, v. NEW YORK LIFE INSURANCE CO., APPELLANT.

(No. 2,503.)

(Submitted February 17, 1908. Decided February 25, 1908.)

[94 Pac. 1.]

Life Insurance—Agents—Fraud—Constructive Notice—Negligence—Ratification.

Life Insurance—Agents—Ostensible Authority—Constructive Notice—Fraud—Negligence.

1. Plaintiff, a foreigner unable to read the English language well, was induced by one C., as agent for a life insurance company, to sign a note as payment of the first premium on a policy in C.'s company. He was rejected and without knowledge of his rejection was later induced by C. to sign a new note, payable to C. and one S., for a policy in a different company, C. falsely introducing S. to plaintiff as the agent of the latter company, and handing to plaintiff for signature an application blank which he had obtained from the local agency director of that company, for the alleged purpose of securing the application on a commission. Plaintiff made no inquiries as to why C. should assume to act for the latter company, and the only ostensible authority exhibited to him by C. was the application blank. Plaintiff in the presence of a number of others signed the note and application without endeavoring to ascertain their contents or requesting some one to read them to him. While the company represented by the agency director had knowledge of the fact that in some instances it was getting brokerage business, plaintiff had no knowledge of this. The company obtained no part of the proceeds of the note. In the receipt given to plaintiff no reference was made to the company. On rejection of his new application plaintiff brought suit to recover the amount of the second note. *Held*, that he was charged with constructive notice of the restriction upon C.'s authority in the premises, and

that he was guilty of such gross negligence as precluded him from recovering from the defendant company.

Same—Ratification.

2. The transaction referred to in the foregoing paragraph cannot be said to have been ratified by the defendant company, where neither it nor its agents had knowledge of it until long after the application had been rejected.

Appeal from District Court, Gallatin County; Thos. C. Bach, Judge.

ACTION by John Weidenaar against the New York Life Insurance Company to recover money paid on an insurance premium note. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Reversed. Mr. Justice Holloway dissents.

Messrs. Hartman & Hartman, for Appellant.

The persons dealing with Weidenaar were not actual or ostensible agents of the New York Life Insurance Company, nor were their acts ever ratified by the company. The essential element of ratification is the adoption of the agent's act by the principal with full knowledge of all the circumstances relating thereto. This element is entirely lacking in the case at bar. (*Suderman Co. v. Rogers* (Tex. Civ. App.), 104 S. W. 195; *Thompson v. Laboringman's etc. Co.*, 60 W. Va. 42, 53 S. E. 908, 6 L. R. A., n. s., 311; *Britt v. Gordon*, 132 Iowa, 431, 108 N. W. 319; *Owings v. Hull*, 9 Pet. (U. S.) 607, 9 L. Ed. 236; *Fitzgerald v. Kimball Co.* (Neb.), 107 N. W. 227; *Cowan v. Sargent Co.*, 141 Mich. 87, 104 N. W. 377; *Valley Bank v. Brown* (Ariz.), 83 Pac. 362.)

It devolves upon a person dealing with another whom he supposes to be an agent for a third person to ascertain at his peril whether in fact the supposed agency exists. (*Moore v. Skyles*, 33 Mont. 135, 114 Am. St. Rep. 801, 82 Pac. 799, 3 L. R. A. n. s., 136; *Nord v. Boston & Montana Min. Co.*, 33 Mont. 464, 84 Pac. 1116, 89 Pac. 647; *Dodge v. Birkinfeld*, 20 Mont. 115, 49 Pac. 590; *Helena National Bank v. Rocky Mt. Tel. Co.*, 20 Mont. 379, 51 Pac. 829; *First Nat. Bank v. Hall*, 8 Mont. 341, 345, 20

Pac. 638; *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458.)

Even though Weidenaar did not read the application because he could not, it was his duty to have the application read to him before he signed it, and his failure to do so renders him bound by its terms just as though he had read it. (*Lauze v. New York Life Ins. Co.* (N. H.), 68 Atl. 31.)

Declarations of an agent are not competent to establish his agency. (*Edmiston v. Hurley*, 30 Ky. Law Rep. 557, 99 S. W. 259; *Blair Baker Co. v. First Nat. Bank*, 164 Ind. 77, 72 N. E. 1027; *Fitzgerald v. Kimball Co.* (Neb.), 107 N. W. 227; *Pease v. Fink*, 3 Cal. App. 371, 85 Pac. 657; *Richards v. Newstifter*, 70 Kan. 350, 78 Pac. 824; *French v. Wade*, 35 Kan. 391, 11 Pac. 138; *Stollenwerck v. Thacher*, 115 Mass. 224; *Chicago etc. Ry. v. Fox*, 41 Ill. 106; *Rawson v. Curtis*, 19 Ill. 456; *Mazey v. Heckethorn*, 44 Ill. 437; *Howe Mach. Co. v. Clark*, 15 Kan. 492; *Harker v. Dement*, 9 Gill, 7, 52 Am. Dec. 670.)

Messrs. Walrath & Patten, for Respondent.

McBride, the "Agency Director" for appellant, was expressly authorized to assume a title which in itself suggests to the public the possession by that officer of general and full powers; he was the superior officer and supreme authority of appellant in the state of Montana, and the scope of his *actual* authority was to appoint, supervise and control the soliciting agents of appellant in this state. This, we contend, was a direct holding out of McBride as an officer having full powers in the matter of appointing soliciting agents, so as to give him, so far as third persons not having actual notice of any limitations were concerned, the ostensible authority to appoint sub-agents to solicit insurance, and bind the company by their acts. He was in law a *general agent* for appellant, as distinguished from a special agent, and ostensibly had full powers and authority in the matter of the appointment, supervision and control of appellant's soliciting agents in this state. (*Equitable Assur. Soc. v.*

Brobst, 18 Neb. 526, 26 N. W. 204; *Insurance Co. v. Wilkinson*, 13 Wall. (80 U. S.) 222, 20 L. Ed. 617; *Goode v. Georgia Home Ins. Co.*, 92 Va. 392, 53 Am. St. Rep. 817, 23 S. E. 744, 30 L. R. A. 842; *Manufacturers' etc. Ins. Co. v. Armstrong*, 45 Ill. App. 217; *Kuney v. Amazon Ins. Co.*, 36 Hun, 66; *Hartford F. Ins. Co. v. Josey*, 6 Tex. Civ. App. 290, 25 S. W. 685.)

Persons dealing with insurance agents as to matters within the apparent scope of their authority are not affected by any unknown limitations thereof. (*Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415, 11 Am. St. Rep. 674, 21 N. E. 1000.)

That respondent, a foreigner, unable to read the English language, was not estopped by the provisions of the application, which was entirely filled out by Castleberry, appellant's agent, who knew Weidenaar's inability to read it, see *La Marche v. New York Life Ins. Co.*, 126 Cal. 498, 58 Pac. 1053; *Metropolitan Life Ins. Co. v. Larson*, 85 Ill. App. 143; *Nute v. Hartford F. Ins. Co.*, 109 Mo. App. 585, 83 S. W. 83; *Capital Fire Ins. Co. v. Montgomery* (Ark.), 99 S. W. 687; *Russell v. Detroit Mut. Fire Ins. Co.*, 80 Mich. 407, 45 N. W. 357; *McCarthy v. New York Life Ins. Co.*, 74 Minn. 530, 77 N. W. 426; *McKay v. New York Life Ins. Co.*, 124 Cal. 270, 56 Pac. 1112; *Michigan Mutual Life Ins. Co. v. Reed*, 84 Mich. 524, 47 N. W. 1106, 13 L. R. A. 349; *Key v. National Life Ins. Co.*, 107 Iowa, 446, 78 N. W. 68.

A restriction prohibiting a soliciting agent from accepting a note instead of cash was not binding on respondent, if he had no knowledge, either actual or constructive, of it. (*Kilborn v. Prudential Ins. Co.*, 99 Minn. 176, 108 N. W. 861; *Starr v. Mutual Life Ins. Co.*, 41 Wash. 228, 83 Pac. 116; *Halle v. New York Life Ins. Co.* (Ky.), 58 S. W. 822; *Godfrey v. New York L. Ins. Co.*, 70 Minn. 224, 73 N. W. 1; *Teutonia Ins. Co. v. Ewing*, 90 Fed. 217, 32 C. C. A. 583; *Mutual Life Ins. Co. v. Logan*, 87 Fed. 637, 31 C. C. A. 172; *Kendrick v. Mutual B. L. Ins. Co.*, 124 N. C. 315, 70 Am. St. Rep. 592, 32 S. E. 728; *Capital F. Ins. Co. v. Montgomery* (Ark.), 99 S. W. 687.).

MR. JUSTICE SMITH delivered the opinion of the court.

The complaint in this action contains the following allegations: That on December 21, 1904, one W. J. McBride was a duly authorized and acting general agent and agency director of the defendant company in the state of Montana, with office at Butte, and as such had the authority to appoint agents of the defendant to solicit applications for insurance in the state; that on said date the defendant, through and by its said general agent, W. J. McBride, and one J. Sam Castleberry, who at the time was an agent duly authorized by McBride to take such application, solicited and took plaintiff's application for a policy of life insurance in the sum of \$5,000; that on the date of the taking of said application Castleberry induced plaintiff to execute to him and one E. E. Saunders, for the use and benefit of defendant, and in payment of the first premium on the policy, a certain promissory note for \$462.30, bearing date December 21, 1904, due four months after date, payable to said Castleberry and Saunders, at the National Bank of Gallatin Valley, with interest at eight per cent per annum from date until paid, and defendant at said time, through its said agent, Castleberry, delivered to plaintiff its receipt for said promissory note, wherein it was provided that in case plaintiff's application was not accepted by the company no policy should be issued, and the promissory note should be canceled and returned to plaintiff; that the application was forwarded by Castleberry to the general agent McBride, at his office in Butte, and the same was thereupon subscribed by McBride as the agent of defendant; that on the thirteenth day of March, 1905, defendant notified plaintiff that his application was rejected, but neither defendant, nor McBride, nor Castleberry, had returned or offered to return the note; that on the twenty-third day of December, 1904, Castleberry negotiated, sold, and assigned the note to the National Bank of Gallatin Valley, and on the twenty-fourth day of July, 1905, plaintiff paid the same, amounting to \$383.90; that defendant, prior to the payment of the note by plaintiff, had refused on demand to

pay the same, and has not paid to plaintiff any part of the sum so paid by him to the bank.

The defendant by answer denied that it ever solicited or took plaintiff's application for insurance; denied that either Castleberry or Saunders was its agent at any time mentioned in the complaint; and denied any knowledge or information sufficient to form a belief as to the transactions between Castleberry and Saunders and the plaintiff, or either of them, concerning the note. After admitting that Castleberry forwarded the application to McBride, and that McBride subscribed the same as general agent of the company, it alleged affirmatively that neither Saunders nor Castleberry was its agent, and that neither of them had ever been appointed, or "pretended to be appointed," or held out, by defendant or McBride, as an agent. It then proceeds:

"(3) That shortly after the twenty-fourth day of December, 1904, an application for life insurance in the sum of \$5,000 in the defendant company, purporting to be signed by plaintiff, was submitted at the office of defendant in the city of Butte, in the state of Montana, to said W. J. McBride, who was requested to submit the same to defendant for action, and for that purpose to sign his name thereto as agent. That said W. J. McBride was ignorant of any of the transactions with plaintiff alleged in the complaint to have been had by said Saunders and Castleberry, or either of them, and neither he or said company, or any of its officers or agents, ever had any knowledge of said alleged transactions until long after the application of said plaintiff for insurance had been declined, as hereinafter set forth.

"(4) That the said W. J. McBride, being in ignorance of such alleged transactions, and supposing and believing that said application was submitted in good faith and had been properly obtained, forwarded the same to the home office of this defendant in New York City, where the same was afterward declined, and said plaintiff notified accordingly of such declination.

"(5) That by said application, so signed by said plaintiff, the plaintiff made the following agreements therein contained and

set forth: '(I.) That no statements, promises, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on the company, or in any manner affect its rights, unless such statements, promises, or information be reduced to writing, and presented to the officers of the company, at the home office, in this application. * * * (IV.) That any payment in advance on account of premium shall be binding on the company only in accordance with the agent's or cashier's receipt therefor on the company's authorized form.'

"That a part of said application so signed by plaintiff reads as follows:

" 'Statement to be signed by applicant upon payment of the premium or any part thereof.

" 'Dated at _____, 1904.

" 'I hereby declare that I have paid to — dollars in cash, and that I hold his receipt for same corresponding in date and number with this application.

" '[Signature of Applicant]

" '_____,'

"And that all of said quoted language is in plain, clear print on said application so signed by said plaintiff. That the company's authorized form of receipt mentioned in said contract, as aforesaid, was attached to and a part of said contract at the time of said signature by plaintiff, and plaintiff failed to sign said statement above set out, or to fill the blanks in the same in any manner whatever, and the same was left entirely blank upon said application, and said authorized form of receipt was left attached to said application and entirely blank, although said receipt provides: 'Fourth. That the liability of the company under this receipt shall not exceed the sum declared by the applicant in his application to have been paid, and that this receipt is non-negotiable, and cannot be assigned or transferred.'

"(6) And by reason of the premises defendant says that plaintiff is, and in good conscience and equity ought to be, con-

cluded and estopped from in any way showing or alleging that this defendant is liable to him by reason of said note mentioned in the complaint, or by reason of any of the transactions in said complaint set forth."

A reply was filed, putting in issue the affirmative allegations of the answer, and then alleging:

"(1) That at the time the plaintiff signed an application for a policy of life insurance to be issued by the defendant company on the twenty-first day of December, 1904, as alleged in the plaintiff's complaint herein, the said J. Sam Castleberry, as the agent of the defendant as alleged in the complaint herein, presented the said application to plaintiff for signature after all blanks therein had been filled out by the said Castleberry, and the said Castleberry thereupon stated to plaintiff the contents of said application. That the plaintiff is a foreigner by birth, to wit, a native of Holland. That the plaintiff is unable to read the English language to any extent at all, being able to read only simple matter when printed in large type, and does not write the English language more than to write his own name. That plaintiff, by reason of his lack of knowledge of the English language, was not able to read the application so prepared for his signature by the said Castleberry, and did not read the same, and that plaintiff was entirely dependent upon the statements of the said Castleberry as to the contents thereof.

"(2) That at the time of the signing of the said application by plaintiff as aforesaid the said Castleberry well knew that the plaintiff could not read the English language so as to be able to read the said application and know the contents thereof from such reading. That, if the said application so signed by said plaintiff as aforesaid contained any such provisions as are set forth in paragraph 5 of the further and affirmative defense set forth in said defendant's answer, or if the said application had attached to it an authorized form of receipt with the provision numbered 4, as set forth in said paragraph 5 of said affirmative defense, the said Castleberry falsely

and fraudulently, and with intent to deceive and defraud the plaintiff, concealed such facts from plaintiff. That the said Castleberry did not state to the plaintiff that the said application to be signed by plaintiff, and which was signed by plaintiff, as aforesaid, contained any such provisions as are set forth in said paragraph 5 of said affirmative defense contained in said defendant's answer; nor did the said Castleberry state to plaintiff that any such 'statement to be signed by the applicant upon payment of the premium, or any part thereof,' as is set forth in said paragraph 5 of said affirmative defense contained in defendant's answer, should be filled out and signed by plaintiff; nor did either the said Saunders or the said Castleberry request plaintiff to sign said statement; nor did either the said Saunders or the said Castleberry state to plaintiff that there was any authorized form of receipt attached to the said application, or state to plaintiff any of the provisions set forth in any such receipt; nor did the said Castleberry or the said Saunders read to plaintiff, or in any wise inform the plaintiff of any of said facts set forth in said paragraph 5 of said affirmative defense of said answer.

"(3) That the plaintiff, in ignorance of any such facts as are alleged in paragraph 5 of the affirmative defense contained in said defendant's answer herein, and believing the statements so made by the said Saunders and Castleberry with reference to the contents of said application to be true, and in reliance thereon, signed the said application, and delivered the same to the said Saunders and Castleberry, and delivered to the said Saunders the said promissory note, as in the complaint herein alleged."

The cause was tried to the court sitting without a jury. There were no findings of fact. The court entered judgment for the full amount claimed by the plaintiff, and from the judgment and an order denying a new trial the defendant appeals.

Many errors are assigned, but those I shall consider are fairly comprehended within the scope of these two assignments: (1) That the court erred in overruling defendant's motion for a

nonsuit; and (2) that the evidence is insufficient to support the decision of the court.

Plaintiff introduced the evidence of E. R. Perkins, second vice-president of the defendant company, to the effect that McBride was an agency director of the company, without power or authority himself to appoint or employ soliciting agents, but with authority to carry on preliminary negotiations and recommend men for that position, the appointment and employment to be made by the agency department of the home office, in every case, by written contract, executed at the home office on behalf of the company; that McBride, by contract, dated November 7, 1904, was allowed a salary of \$200 per month, and also a first year's commission of sixty per cent on business personally procured by him; that during the year 1905 he was to be allowed additional compensation, provided the new insurance procured by new agents brought into the service of the company by him amounted to certain specified amounts, the amount of compensation being governed by the volume of new insurance procured; that neither Saunders nor Castleberry was the agent of the defendant for any purpose during the times mentioned in the complaint.

McBride testified that he did not know Saunders and never saw him; that he had never appointed either Castleberry or Saunders a soliciting agent for the company. He produced the original application of the plaintiff for insurance, containing, among other things, the matters set forth in the defendant's answer. Following the blank receipt recited in the answer, the application contained this: "Received from * * * at * * * , state of * * * , this * * * day of * * * , 1904, the sum of * * * dollars, the sum declared by the applicant in his application to have been paid in cash, on the following conditions and agreements:

"First. That if a policy be delivered on the application for insurance made by the above this day to the New York Life Insurance Company, corresponding in date and number with this

receipt, said company shall accept this receipt as cash towards payment of the first premium on the said policy.

"Second. That this receipt will not be valid if issued for any sum in excess of the sum declared by applicant in such application to have been paid. It will not be valid if issued after December 31, 1904. It will not be valid if erasures or additions have been made in the printed form. It will not be valid unless the person to whom it is issued is promptly examined by a regularly appointed examiner of the New York Life Insurance Company.

"Third. That, if a policy be not issued on said application and examination within sixty days from this date (and only in that event), said sum will be returned on surrender of this receipt to the company.

"Fourth. That the liability of the company under this receipt shall not exceed the sum declared by the applicant in his application to have been paid, and that this receipt is non-negotiable, and cannot be assigned or transferred. (Agent must sign here) _____, Agent. * * * Names and addresses of every agent to whom this business belongs and his share in the amount of the policy: Name: W. J. McBride. Address: Care Butte, Mont. Share: All."

McBride then continued: "On or about December 14th or 15th of the year 1904, one morning about 11 o'clock, a gentleman came into my office, introducing himself as J. S. Castleberry, of Bozeman, Mont., stating that he was representing the Continental Life Insurance & Investment Company, of Salt Lake City. I talked with him a little while in the usual way, and after a few minutes he told me that he had a case which his company had declined, as he thought, for no good reason, and he wanted to know if I would care to submit it to our company. I asked him about the matter, and from what he told me I thought the man might get a policy with the New York Life, so I told him that I would be glad to submit it to the New York Life in my name, and would regard it as a brokerage business, and, if the policy was issued, would allow him a brok-

erage commission of 25 per cent. After vainly trying to persuade me to allow a larger commission, he finally said: 'Well, then, if you will let me have an application blank and the name of your examiner, I will get the application signed up to-morrow when I go back to Bozeman, and will have the party examined for your company, and send it in to you.' I then explained to him that, inasmuch as I was going to forward it in my own name, he need not witness the signature of the applicant, but that I would do that when it was received. This man Castleberry had with him papers and letters which warranted me in believing him to be all right, from every standpoint, and I felt that I was perfectly safe in pursuing this course. The application did not come to me on the next day, or the day after, but on December 29th, the day on which same was forwarded to the home office. Mr. Castleberry came again to the office in person, and came into my room, and handed me the application and medical examination. No coupon receipt was detached, and there was nothing to show that any kind of a settlement had been made. After taking the papers and looking over them I saw that they were to all appearances correct, and told Mr. Castleberry that I would send them off that night and when the policy came would promptly notify him. He then took a check-book out of his pocket and drew a check for \$5, saying that was the amount which the applicant had paid him, but that he did not give him a receipt for the same as he did not think he had the authority to sign a New York Life receipt. I told him he did exactly right, and that the \$5 which he was giving me would be reported in suspense, and if for any reason the policy was not issued as applied for, or was declined outright, the \$5 would be refunded. The matter dragged along until March 2, 1905, during all of which time I considered everything regular and straight. The notice of the case being declined was received by my office on March 7th; and on that date the cashier drew a check for \$5, making the check payable to the order of the applicant, J. E. Weidenaar, and I wrote a letter to Mr. Castleberry on that date notifying him of the com-

pany's action, inclosing the check, asking him to deliver it to Mr. Weidenaar and obtain from him a voucher for the same. To that letter I have never received a reply."

Plaintiff testified as follows: "I live in the Holland settlement, a few miles west from Bozeman. The first time Castleberry came to my place he came as agent for the Continental of Salt Lake City, and he wanted to get me a life insurance policy, and I gave him that application for \$5,000, and after that I was rejected. I could not say exactly what time it was that this second trip was made by Castleberry with Saunders to my place. Saunders claimed he was agent of the New York Life. He came there, and Mr. Castleberry introduced Mr. Saunders to me, and he says: 'Here is an agent for the New York Life.' He says: 'We can get you a better policy in the New York Life, but it would cost a little more.' I don't understand. I am a Dutchman. When it comes down to the very point, I know nothing. I gave him an application for life insurance. I gave him a note. I don't know the name, but I gave him my note. I renewed that note at the bank. I gave another note instead of it when it came due. The note reads as follows:

" '\$462.30. Bozeman, Mont., 12/21, 1904.

" 'Four months after date, for value received, we jointly and severally promise to pay to the order of J. Sam. Castleberry and E. E. Saunders four hundred and sixty-two 30/100 dollars, with interest at 8 per cent per annum from date until paid, and with attorney's fees in addition to other costs, in case the holder is obliged to enforce payment at law.

" 'JOHN E. WEIDENAAR.

" 'Payable at the National Bank of Gallatin Valley, Bozeman, Montana.'

" 'Indorsed across the face: 'Paid 383.90 July 24, 1905, and note canceled.' Indorsed on back: 'J. Sam. Castleberry, Ed. E. Saunders. Paid \$383.90 July 24, 1905.'

" 'I gave a note in place of this note. That note reads as follows:

“\$383.90.

Bozeman, Montana, July 24, 1905.

“‘Four months after date, for value received, we jointly and severally promise to pay to the order of the National Bank of Gallatin Valley three hundred eighty-three and 90/100 dollars, with interest at ten per cent per annum from date until paid, and with attorney’s fees in addition to other costs, in case the holder is obliged to enforce payment at law.

“‘JOHN WEIDENAAR.’

“‘Indorsed across the front: ‘National Bank of Gallatin Valley. Paid December 11, 1905. Bozeman, Montana.’

“‘At the time I gave Castleberry this application and my note he told me he would take it over to Butte to McBride, and McBride wanted to take it over to New York. Castleberry told me at that time that McBride was the head man for the state of Montana with the New York Life. He told me, in relation to this application, that it would be a better policy than the other. He says: ‘If you pay so much down on it, you will get the bonds back if you do.’ He told me he got the blank application from McBride in Butte. Saunders claimed he was the agent for the New York Life. Castleberry did not tell me who sent him to me to take this application. He says to me, this policy would be better for me than the other—than the Continental. Saunders and Castleberry prepared the application that I signed. I couldn’t write it, you know. One or the other wrote it and fixed it up for me. When I gave Castleberry my note and application, he gave me a receipt, which reads as follows:

“‘Manhattan, Montana, Dec. 21, 1904.

“‘Received of Mr. John E. Weidenaar new note and papers for purpose of changing his policy to the bond policy, and all old papers and note is to be canceled and returned as soon as new papers reach home office.

“‘[Signed] E. E. SAUNDERS,

“‘Gen. Agent for Montana, Idaho, and Utah.

“‘J. SAM. CASTLEBERRY.’

"After I gave the application and note to Castleberry I was not required to do anything else by him; but I took a medical examination in connection with this at Manhattan, where I went for that purpose on the second day after giving the application. I never received any policy of insurance. I was notified by letter that I was rejected. I do not know why I was rejected. Castleberry first wrote me an application for insurance in the Continental, which was the company he was representing, and I gave a note for that premium for \$382 or \$383. The time I gave this \$462.30 note was when Castleberry and Saunders came out to see me. At that time I had not been notified that the Continental had rejected me or my application, and they did not tell me at that time that I had been rejected. They simply told me that they thought I ought to have a better policy, a little more expensive one. They told me that I would get back this other note that had been given for the first policy, and I was to get it back right away. They would give this other one in and would give me it back. They told me that this first note was in the bank and they would put this second one in and bring it back, and I got the first one back. When I come to give the new note for \$462.30, my note in the bank was for only \$383. The bank first cashed that note. They afterward found Castleberry and Saunders were not any good, and were robbing the people, and they did not want to cash the new note that I gave for \$462.30, and interest; so I really took up the Continental note, with interest. Saunders and Castleberry told me they would take this new note down to the bank and take up my \$382 note and return it to me. This they did. When I gave my new note for \$383.90, that was the amount of money that Castleberry had actually got on my first note, with interest. I did not on the day Castleberry and Saunders were at my place pay Castleberry \$5 to be given to McBride. The only thing I did was to give that note."

Miss Lucy Weidenaar, a daughter of the plaintiff, testified that her father did not write English and did not read English well.

In the motion for nonsuit, interposed by the defendant, it was urged that there was no evidence showing or tending to show any liability of the defendant to pay the sum claimed on account of the transaction set forth in the complaint, and that there was no evidence showing or tending to show that either Castleberry or Saunders was the actual or ostensible agent of the defendant, or had any authority to bind the company.

For the defendant, W. J. McBride testified that at the time of receiving plaintiff's application he had no knowledge whatever of the note for \$462.30. "I never heard of that note until after the application had been rejected." Regarding his part in the transaction, he said: "I did not give plaintiff any receipt, nor did I authorize Castleberry and Saunders, or either of them, to give a receipt at the time of taking the application for said policy, or at any other time. I, as representative of the New York Life, would have had authority to collect the premium; but I did not give or attempt to give Saunders or Castleberry, or either of them, any authority to collect any premium, or to take any note from plaintiff at the time of taking this application, or at any other time. I, as an agent of the company, had no power or authority at all to take notes from applicants for insurance in payment of premiums. When a note or other terms of settlement were taken, except cash, as I understand the rules of the New York Life Insurance Company, they are taken solely at the agent's risk. The company accepts cash only in settlement of premiums. I did not authorize Saunders or Castleberry, or either of them, to make any representations or agreements whatever on my behalf, or on behalf of the defendant company, at any time with reference to the application for the policy, and the collection of premiums, or any part thereof, or the execution of any note therefor. Neither of them made any report or representations, or otherwise gave information or intimation to me, that they had taken any note of plaintiff in the transaction above mentioned, or had executed any receipt or made any statements or representations or agreements for themselves or for me, or for the company, to plaintiff in regard to

said transaction, or any part thereof. I never saw the original receipt, and I did not know that plaintiff claimed to have such a receipt until April, 1905. Saunders was not the general agent of the New York Life Insurance Company in Montana, and I do know that he had no authority to give the plaintiff any such receipt in behalf of that company; and Castleberry was not the agent of the New York Life Insurance Company, nor did he have any such authority to give plaintiff any such receipt in behalf of the New York Life Insurance Company."

John C. McCall, the secretary of the defendant company in New York, testified that the first information the company had of the transactions complained of by the plaintiff was a letter from the plaintiff, dated April 5, 1905; that neither Saunders nor Castleberry was at any time an agent for the company or in any way connected with it; that all soliciting agents employed in 1904 executed a contract when they were employed by the company; that no agent had any right or authority to take notes in payment of premiums on policies of insurance, and that it is contrary to the rules and instructions given to its agents for them to do so; that in the soliciting agent's contract it is agreed between the parties that the agent should have no authority to extend the time of payment of any premiums or to waive payment in cash.

William E. Moore testified on behalf of the defendant that at the time of trial he was agency director for the defendant company at Butte, and had been an agency director of the company since the year 1900, prior to which time he was a general agent. He said further: "Our company instructs its directors of agencies that we cannot accept brokerage business. It is natural for us, or any individual, whether he has accepted it as it appears on its face as present, in taking that, to put it to our company for consideration, and we hold this policy until the cash is paid. When this policy is acted on, and we have it ready for delivery, unless the party in question can establish himself, we never leave it go out of our hands without taking cash. We consider there is a fixed charge for medical fees

which is paid. \$3 and \$2, to look the case up and get a few entries on paper—a pen picture. Now, in order to make the fee safe on that little charge, it is the rule that we require the \$5 to be deposited by every one. That is for the physician. Should Mr. Castleberry or anyone else present a case to me, if he should not absolutely give me the \$5, and I know those parties are absolutely good, we make a little tab; but, unless we are willing to make it good ourselves, we must collect the \$5. The point is this: Brokerage business not only applies to the insurance agent, but an attorney, if you please. He brings the business in and says: 'I have a case, and I would like for your company to consider it, and what will you allow?' And we consider that as brokerage business. We pay less commission to-day, less than other people do. We cannot allow as much to the man that picks it up in a casual way. It is one of little value as brokerage. It has been our custom, and is to-day, that, where a piece of business like that comes in, that is, where a party brings business to you that is handled by anyone, we put some agent's name on it. Some agent's name goes on this business that is really under contract with the company. We will consider a risk, if presented to one of our branch officers; and it is a custom, perhaps of all our agents, to take a risk where it has been turned down, perhaps, by another company, for some cause. Very frequently we take business that other companies will not take. When business is brought to us by an outside man or somebody else, we take the position that the party who brings it is a friend of the other party. We have no right to bind him. He has no agreement signed with us, so we could not hold him as the applicant to us. We take a look at it, and, if it looks like physically good business to us, we may pass on it, and never turn it loose until we get the business. It is necessary to have it formally presented to us, if it comes in the shape of our application on one of our blanks. When that sort of business is first brought to us, they present the matter informally, and, if it is of such nature as we will undertake to

furnish them a blank to obtain the application in a formal way of the party and send it in to our company. This is the custom that exists in our company to carry on the brokerage business in the form I have stated. You can put it in that shape that we do it. That class of business has been frequently done in connection with our company by their agents and other parties. As to whether that has been done with the knowledge of our superior officers, I say we have a rule directly from New York. I cannot recall what that rule is now. We have, with limitations, a rule which permits agents of our company to accept business of that kind, in the manner that I have stated. I state that this brokerage business is understood by the officers of the company, and is a frequent occurrence in the work of our company, as a matter of courtesy."

The plaintiff testified, in rebuttal, that at the time he gave Castleberry his application he had no knowledge of any rule of the company requiring a cash settlement of the first year's premium.

The foregoing is substantially all of the testimony in the case.

The following provisions of the Civil Code seem applicable:

"Sec. 3073. An agency is either actual or ostensible.

"Sec. 3074. An agency is actual when the agent is really employed by the principal.

"Sec. 3075. An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent, who is not really employed by him."

"Sec. 3091. An agent has such authority as the principal, actually or ostensibly, confers upon him.

"Sec. 3092. Actual authority is such as the principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess.

"Sec. 3093. Ostensible authority is such as a principal, intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess.

"Sec. 3094. Every agent has actually such authority as is defined by this title, unless specially deprived thereof by his principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority.

"Sec. 3095. An agent has authority: 1. To do everything necessary and proper and usual, in the ordinary course of business, for effecting the purpose of his agency: and, 2. To make a representation respecting any matter of fact, not including the terms of his authority, but upon which his right to use authority depends, and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made."

"Sec. 3114. A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without ordinary negligence, incurred a liability or parted with value, upon the faith thereof."

Let us first determine what authority was conferred upon Castleberry, either actually or ostensibly, assuming that he was the agent of the defendant. We have the testimony of Perkins that McBride had no authority to employ soliciting agents. McBride's contract, however, reads: "It is agreed that if, during the year beginning January 1, 1905, * * * the new insurance procured by new agents brought into the service of the company by you during said period," etc. It may be argued that during the year 1905, McBride's authority was enlarged in this respect, although I am of opinion that the only manner in which he could bring new men into the service of the company was in accordance with the rules testified to by Perkins. Note, also, that this clause of the contract relates, in terms, to the year 1905. The only evidence as to what McBride's authority was in 1904, when the note was given, is found in his testimony, wherein he says: "From October, 1904, to July, 1905, I was agency director of the Montana branch, which was located at Butte, Mont. During the term in which I was agency director I had authority from defendant to ap-

point, supervise, and control the agents of the company in the state of Montana, subject always to the approval of the home office." Again, it seems to have been established that the defendant company had knowledge that it was getting, in some cases, what was called "brokerage business," that is, business brought to its agents by outsiders who shared in the agent's commission. Of this, however, plaintiff had no knowledge and could not have relied upon it. The Code declares (section 3091, *supra*) that an agent has such authority as the principal actually or ostensibly confers upon him. The actual authority conferred upon Castleberry came wholly from McBride. He testified: "He [Castleberry] told me that he had a case that his company had declined, and he wanted to know if I would submit it to our company. I told him I would be glad to submit it to the New York Life in my name, and would regard it as a brokerage business, and, if the policy was issued, would allow him a brokerage commission of twenty-five per cent. He said: 'If you will let me have an application blank and the name of your examiner, I will get the application signed up to-morrow when I go back to Bozeman, and will have the party examined for your company and send it in to you.' I then explained to him that, inasmuch as I was going to forward it in my name, he need not witness the signature of the applicant, but that I would do that when it was received. On December 29th Castleberry came again to the office in person, and handed me the application and medical examination. * * * He then took a check-book out of his pocket and drew a check for \$5, saying that was the amount the applicant had paid him, but that he did not give him a receipt for the same, as he did not think he had the authority to sign a New York receipt. I told him he did exactly right."

It seems clear to me that the only authority conferred upon Castleberry, either actual or ostensible, was to go to the plaintiff and receive his application and, in connection with that, a report from the medical examiner. Castleberry went to the plaintiff. He, at that time, was engaged in an attempt to de-

fraud either one or both of the parties to this action. Plaintiff had no evidence of what his actual authority was. He falsely told plaintiff that Saunders was an agent of the company, but did not claim to be an agent himself. Plaintiff, in a letter to McBride, said: "Castleberry himself claimed to be acting in a *special capacity* for the time being, and at that time stated that within a few days his contract would be signed, making him the regular authorized agent of the New York Life in this community." The only presumption that plaintiff could reasonably indulge at this time was that Castleberry was still the agent of the Continental Life Insurance Company. Indeed, in my judgment, the plaintiff's testimony shows conclusively that he so regarded Castleberry, and that he acted upon that presumption through the entire transaction. The only ostensible authority exhibited by Castleberry to the plaintiff was the application blank. It does not appear that he had a blank for the medical examiner. That was probably furnished by the medical man. If so, it was a day or so after plaintiff signed the note, and can have no bearing upon this part of the case.

The plaintiff is a foreigner by birth, unable to write the English language, with the exception of his name, or to read it well. His daughter says that Castleberry and Saunders "fixed up" the application and note, and thereupon her father signed the same. The expression "fixed up" only denotes that these men filled in the blank spaces and wrote out the note. No claim is made that they misled the plaintiff as to the contents of either, or attempted to deceive him as to what he was signing, or withheld anything from him relating to the papers. No such action was necessary. It does not appear that plaintiff exhibited any curiosity about what he was signing, that he attempted to read the application, or that he was able, personally, to know that it bore the name of the defendant company. No request was made to have the application or the note read over to him, although his daughter, his two sons, and a man named Boomer were present at the time. The record is silent as to whether any of them could read the application; but the fact remains

that the plaintiff signed it blindly, without any effort to learn its contents. Neither did he make any inquiries as to why Castleberry, not being the agent of the New York Life Insurance Company, should assume to act for it in any capacity. Plaintiff himself testified thus as to what Castleberry's statements to him were: "He told me he would take the application over to Butte to McBride, and McBride wanted to take it over to New York. He said he got the blank application from McBride in Butte, and Saunders claimed he was the agent of the New York Life. Castleberry didn't say who sent him to take my application; I don't know."

It appears to me that plaintiff relied entirely upon Saunders's statement, corroborated by Castleberry, that he was the agent of the defendant company. And, in effect, Castleberry told plaintiff exactly what the extent of his own authority, in relation to the application, was. At every stage of the proceeding plaintiff had it in his power to protect himself, and this, not by any action requiring effort on his part, but simply by refusing to sign his name to a paper, the contents of which were unknown to him. On the other hand, defendant had no opportunity to obtain any part of the proceeds of the note, save by the consent of Saunders, one of the payees, to indorse his name thereon. The note was not payable to the defendant, nor to Castleberry, as its agent, but to E. E. Saunders and J. Sam. Castleberry, as individuals; Saunders being an outside party to the affair so far as the defendant was concerned. Had it been made payable to the company, the defendant could have retained or returned the same at its option, and plaintiff would have suffered no injury. Neither Saunders nor Castleberry could have obtained the money on it without forgery. Had it been made payable to Castleberry, as a soliciting agent of the company, with full powers as such, I am not prepared to say that would not have been payment to the company, under certain circumstances. When plaintiff made his note payable to Saunders and Castleberry, he put it into the power of an

outsider to negotiate the same, jointly with Castleberry, and retain the proceeds.

The receipt given plaintiff, had he ascertained its contents, should have been notice to a reasonable man that an attempt was being made to defraud him. No reference is made therein to the defendant company, and its phraseology seems to indicate a purpose, not so much to pay a premium to the defendant, as to get back plaintiff's first note, given under like circumstances of negligence. Had the plaintiff exercised ordinary care, he would have ascertained from the application signed by him that it was therein declared that no statements, promises, or information made or given by or to the person soliciting or taking the application, or by or to any other person, should be binding on the company, or in any manner affect its rights, unless such statements, promises or information should be reduced to writing and presented to the officers of the company at the home office, *in the application*; that any payment in advance on account of premium should be binding on the company only in accordance with the agent's or cashier's receipt therefor, on the company's authorized form; that there was a form attached to the application which, when filled in, would be notice to the company that the insured claimed to have made a payment to the agent taking the application; that there was also attached another blank form, to be filled in and signed by the agent, showing the conditions under which the advance payment was made. I am aware that a failure to observe or fill in these blanks will not and should not, in all cases, amount to a declaration by the insured that no payment had been made; but I think, in this case, consideration should be given to all parts of the transaction in determining whether plaintiff exercised reasonable care. These recitals in the application were, to some extent, at least, binding upon the plaintiff under the circumstances disclosed by this record. He cannot be heard to say that he relied upon so much of the application blank as disclosed the fact that it pertained to the business of the

defendant, but that he repudiates those provisions thereof beneficial to the company.

In my opinion, sections 3094, 3095, and 3114 of the Civil Code are decisive of this case. I think plaintiff must be charged with constructive notice, at least, of the restriction upon Castleberry's authority; that by the use of reasonable diligence he could have determined that the representations of Castleberry, upon which he now assumes to rely, were not true; and that the liability incurred by him, if any, was incurred through his own negligence. I am of opinion that he was guilty of such gross negligence in signing the note as precludes him from now claiming that the negligence of the defendant in intrusting Castleberry with the blank, was the cause of the situation in which he now finds himself. That Castleberry and Saunders were successful in their nefarious enterprise was due entirely, in my judgment, to a want of ordinary care on the part of the plaintiff. I also seriously doubt whether plaintiff in fact suffered any detriment in the business. The amount he was obliged to pay was no more than the amount due on his original note to the Continental Life Insurance Company, upon which he was presumably liable.

There is no question of ratification on the part of the defendant, because the testimony shows neither the company nor any of its officers or agents had any knowledge of the transaction between plaintiff, Castleberry, and Saunders, save what appeared on the face of the application, until long after the application had been rejected. (*Schnepel v. Mellen*, 3 Mont. 118; Civ. Code, sec. 3086; 1 Am. & Eng. Ency. of Law, 2d ed., 965.)

In the consideration of this case, many adjudications of the courts, in cases where life insurance companies were parties, have been examined, including all cases cited by the respondent. It seems to me that some courts, of the very highest respectability and learning, have taken judicial notice of matters which they were not by law authorized to judicially know, and have gone so far in holding insurance companies liable as to result in the application of different rules of contract law to

them than would have been applied to individuals under the same circumstances. I cannot agree that this may rightly be done. While I have no doubt that many life insurance solicitors resort to reprehensible means to obtain business, and sometimes commit crime, as was done in this case, I think the law should be applied, without prejudice, to all alike, and I feel certain that the same law that affords protection to a person dealing with an individual will, if properly construed and applied, afford equal protection to one dealing with a life insurance company.

The judgment and order appealed from should be reversed. The action not being in equity, or based upon an agreed statement of facts, a new trial should be ordered.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY: I dissent. I do not think there is any question of ostensible agency involved in this case, and therefore it is wholly immaterial that the plaintiff did not exercise that degree of care and caution which he ought to have observed. Castleberry either was or was not the agent of the insurance company. I am satisfied that he was such agent, and this, too, independently of what any of the witnesses may have said upon the subject. That McBride was the general agent of the insurance company in this state I think is perfectly clear. (*Kilborn v. Prudential Ins. Co.*, 99 Minn. 176, 108 N. W. 861.) That he could make Castleberry agent of the company (a) by virtue of the power implied by his contract of agency, and (b) by virtue of the fact that the custom which he observed in engaging in the so-called brokerage business was known to and approved by the company, is clear to my mind. (Civ. Code, sec. 3140.) That McBride did arm Castleberry with the necessary blanks to take plaintiff's application and secure his medical examination and send him forth for the purpose is clear.

If Weidenaber had passed a satisfactory medical examination, there cannot be any doubt that the company would have issued

a policy, and in that event plaintiff would have been insured by virtue of Castleberry's agency in the transaction. If Castleberry would have been the agent in the event plaintiff's application had been accepted, he was no less the agent in securing the application, although it was not accepted, for its non-acceptance was not based upon Castleberry's want of authority in soliciting the business. In procuring plaintiff's application, I think Castleberry was the soliciting agent of the insurance company, and, as such, he had authority "to do everything necessary and proper and usual, in the ordinary course of business, for effecting the purpose of his agency." (Civ. Code, sec. 3095, subd. 1.)

That the soliciting agent of this company had authority to accept payment of the first premium is equally clear. The blank applications furnished by the company disclose this fact, for the form of receipt to be given for such first premium is indorsed on every such application. I think it is a general rule that, "where the agent is authorized to accept the payment of premiums, he may exercise his discretion as to the mode of payment. He may, for instance, accept a note or a check, instead of the money." (May on Insurance, sec. 134.) The authorities in support of this principle are so numerous that only a few need be cited. (*Michigan Mutual Life Ins. Co. v. Hall*, 60 Ill. App. 159; *National Life Ins. Co. v. Tweddell*, 22 Ky. Law Rep. 881, 58 S. W. 695; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300, 39 Am. Rep. 584; *Starr v. Mutual Life Ins. Co.*, 41 Wash. 228, 83 Pac. 116; *Kilborn v. Prudential Ins. Co.*, above.)

I do not think that any significance whatever can be attached to the fact that plaintiff's note was made payable to Castleberry and Saunders, and that they negotiated it. The company is in no worse situation than it would have been, had the first premium been paid in cash and the money embezzled by Castleberry. The breach of trust on the part of an agent cannot determine the question whether a contract of insurance had been actually consummated or the company rendered liable for the acts of its agent. I think the judgment ought to be affirmed.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT WRITTEN OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 2,452.—C. W. LAY ET AL., RESPONDENTS, v. H. L. CONNORS, APPELLANT.

Appeal from District Court, Gallatin County; W. E. C. Stewart, Judge.

On motion to dismiss appeal.

Decided October 2, 1907.

PER CURIAM.—Appellant's motion for dismissal of the appeal herein is hereby sustained and the appeal dismissed.

Mr. John A. Luce, for Appellant.

No. 2,459.—L. H. FAUST, RESPONDENT, v. RUSTLER MINING AND MILLING COMPANY ET AL., APPELLANTS.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Decided October 28, 1907.

PER CURIAM.—As per stipulation of counsel the appeal in this cause is hereby dismissed.

Messrs. Grubb & Rhoades, for Appellants.

Mr. D. F. Smith, for Respondent.

No. 2,491.—CITY OF BILLINGS, APPELLANT, v. NORTHERN
PACIFIC RY. CO., RESPONDENT.

*Appeal from District Court, Yellowstone County; C. H. Loud,
Judge.*

On motion to dismiss appeal.

Decided November 18, 1907.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with respondent's motion on file herein.

Messrs. Wallace & Donnelly, for Respondent.

No. 2,474.—EDWARD MORRISSEY, RESPONDENT, v. E. H.
WILSON, RECEIVER, APPELLANT.

*Appeal from District Court, Silver Bow County; Michael
Donlan, Judge.*

Decided November 18, 1907.

PER CURIAM.—It is by the court ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed at the cost of the appellant, in accordance with stipulations of counsel on file herein.

Mr. M. S. Gunn, and Mr. Chas. E. Leonard, for Appellant.

Messrs. Kremer, Sanders & Kremer, for Respondent.

No. 2,489.—EDWARD JENIZEN, TRUSTEE IN BANKRUPTCY,
APPELLANT, v. JOSEPH SIMS ET AL., RESPONDENTS.

*Appeal from District Court, Fergus County; E. K. Cheadle,
Judge.*

On motion to dismiss appeal.

Decided December 6, 1908.

PER CURIAM.—It is hereby ordered that the appeal in this cause be, and the same is hereby, dismissed on motion of appellant.

*Mr. W. M. Blackford, and Messrs. Walsh & Nolan, for Ap-
pellant.*

No. 2,504.—STATE, RESPONDENT, v. G. S. E. WISNER, AP-
PELLANT.

*Appeal from District Court, Deer Lodge County; Geo. B.
Winston, Judge.*

Decided December 28, 1907.

PER CURIAM.—The court being advised by the attorney general that the judgment appealed from in the above-entitled action is based upon the information considered by this court in *In re Wisner*, 36 Mont. 298, 92 Pac. 958, and that the sufficiency of said information is raised in said appeal, it is hereby ordered and adjudged that the judgment of the court below and the order denying defendant's motion for a new trial be and the same are hereby reversed, upon the authority of *In re Wisner, supra*.

and the cause remanded with directions to dismiss the information; all other questions raised in said appeal being reserved.

Messrs. Rodgers & Rodgers, and Mr. J. H. Duffy, for Appellant.

Mr. Albert J. Galen, Attorney General, for Respondent.

No. 2,519.—CATHERINE COURTNEY, RESPONDENT, v.
JOHN McGRATH ET AL., APPELLANTS.

Appeal from District Court, Silver Bow County.

On motion to dismiss appeal.

Decided January 16, 1908.

PER CURIAM.—The appellants having failed to file their transcript on appeal herein within the time allowed by the rules of this court, the motion of respondent to dismiss the appeal is hereby sustained and the appeal dismissed.

Mr. John F. Davies, for Respondent.

No. 2,525.—MARY A. SLOAN ET AL., APPELLANTS, v. LUELLA
BYERS ET AL., RESPONDENTS.

Appeal from District Court, Jefferson County.

Decided February 10, 1908.

PER CURIAM.—The appeal herein is hereby dismissed without prejudice, in accordance with motion of the appellants.

Messrs. Walsh & Nolan, and Mr. Geo. F. Cowan, for Appellants.

INDEX.

ACCOMPLICES.

See Criminal Law, 18-20.

ACCOUNTING.

Principal and Agent—Recovery of Money Collected by Agent—Theory of Case.

1. Plaintiff company sued to recover moneys, collected by defendant while acting as its agent, which he failed to pay over after demand. By a second count, a sum of money, alleged to have been collected by defendant for other parties, while acting as plaintiff's agent, but which he neglected to forward to the persons entitled thereto and which plaintiff was required to pay, was sought to be recovered. Full payment of plaintiff's claim was pleaded by defendant, and judgment in a fixed amount demanded by way of counterclaim. There was no allegation in the answer that an accounting was necessary, and none was asked. The action was tried as one at law to recover a money judgment. *Held*, that the action was one at law and not a suit in equity for an accounting.—*Judith Inland Transportation Co. v. Williams*, 25.

When not Proper Remedy.

2. Where one knows the exact amount due him from another, an action at law for a money judgment will afford him all the relief to which he is entitled, and equity will not interfere by way of an accounting, the purpose of which is to have settled a complicated account, the exact status of which the plaintiff is unable to determine for himself.—*Donovan v. McDevitt*, 61.

Complaint—Demurrer—When It will not Lie.

3. Where it appeared from the face of a complaint that defendant was indebted to plaintiff in a certain amount for money had and received, the pleading was proof against a general demurrer, and the fact that plaintiff demanded equitable relief by way of an accounting was immaterial.—*Donovan v. McDevitt*, 61.

ACTIONS.

Accounting—When not Proper Remedy.

1. Where one knows the exact amount due him from another, an action at law for a money judgment will afford him all the relief to which he is entitled, and equity will not interfere by way of an accounting the purpose of which is to have settled a complicated account, the exact status of which the plaintiff is unable to determine for himself.—*Donovan v. McDevitt*, 61.

Forms.

2. While the principles applicable to those actions for which particular forms are required at common law are recognized in this state, there is, under section 460 of the Code of Civil Procedure, but one form for civil actions, whether they be at law or in equity.—*Donovan v. McDevitt*, 61.

Mechanics' Liens—Joinder of Causes—On Contract—*Quantum Meruit*.

3. Where plaintiff in a suit to foreclose a mechanic's lien joined a count on an express contract for the construction of a cistern, with a count on a *quantum meruit*, the averments of each not having been so inconsistent as to be contradictory, and where the defendant was not misled to his prejudice, a demurrer on the ground of ambiguity and uncertainty was properly overruled.—*Neuman v. Grant*, 77.

Character of Action—How Determined.

4. The character of an action may not be determined from a casual remark of either court or counsel during trial, but must be arrived at from the pleadings.—*Collins v. McKay*, 123.

Mistake in Form—Relief—Immateriality.

5. Since, under section 28, Article VIII, Constitution, there is but one form of action in this state, and law and equity may be administered in the same case, a mistake as to the form in which an action is brought or as to the relief demanded upon the statement of facts made, is of no moment.—*Anderson v. Red Metal Min. Co.*, 312.

Common-law Principles—Applicable Under Codes.

6. While by the adoption of the Codes the common-law forms of pleading were abolished in this state, the fundamental principles of that law underlying the various actions must still be looked to in determining questions relating to such actions.—*Fleming v. Lockwood*, 384.

ADMINISTRATORS.

See Quieting Title, 1, 2.

ADVERSE PARTY.**Appeal—Notice.**

1. Under Code of Civil Procedure, section 1760, providing that when an appeal is taken a notice thereof must be served on the adverse party, etc., an adverse party is one who has an interest in opposing the object sought to be accomplished by the appeal.—*Anderson v. Red Metal Min. Co.*, 312.

Same.

2. Where in an action before a justice of the peace, brought by an assignee on an account, the debtor interpleaded, besides one other, the assignor, who admitted the assignment and disclaimed any interest in the subject matter of the controversy, the latter was not an adverse party, within the meaning of section 1760, Code of Civil Procedure, upon whom it was necessary to serve notice of an appeal to the district court.—*Anderson v. Red Metal Min. Co.*, 312.

ADVERSE USE.

See Highways, 1-5.

AGENCY.

See Principal and Agent.

AMENDMENTS.**Trial—Pleadings—Refusal—Error.**

1. Where the district court permitted plaintiff, after commencement of trial of an action to recover real property, to amend his complaint, which, prior to amendment, stated no cause of action, it was error to

refuse permission to defendant to amend her answer.—*O'Toole v. Copeland*, 344.

APPEALABLE ORDERS.

See Appeal and Error, 29, 30.

APPEAL AND ERROR.

See, also, Supreme Court.

Instructions—Refusal—When not Error.

1. Error cannot be predicated upon the refusal of an instruction not justified by the evidence.—*Judith Inland Transportation Co. v. Williams*, 25.

Pleadings—Complaint—Jurisdiction.

2. The objection that a complaint fails to allege a jurisdictional fact may be raised for the first time on appeal.—*Rumping v. Rumping*, 39.

Equity—Laches—Striking Competent Testimony—When Harmless.

3. Where the district court correctly found that plaintiffs' cause of action in a suit for the cancellation of a deed to mining property, on the ground of fraud, was barred by laches, alleged error in striking out competent and material testimony which tended to support a charge of conspiracy to defraud, will not be considered.—*Streicher v. Murray*, 45.

Judgment-roll—Record—Sufficiency.

4. A certificate of the clerk of the district court, stating that the record on appeal in a civil case contains copies of all the papers constituting the judgment-roll, *held*, to be a sufficient compliance with the requirement of section 1736 of the Code of Civil Procedure, that upon appeal from a judgment the appellant must furnish the supreme court with a copy of the judgment-roll.—*Donovan v. McDevitt*, 61.

Public Highways—By Prescription—Evidence—Sufficiency—Review.

5. In an action to quiet title to a portion of a city lot, evidence reviewed and *held* not to so clearly preponderate against a finding of an adverse use by the public for the full statutory period as not to support a conclusion that the strip had become a public highway by prescription, and for that and the further reason that plaintiff had never at any time, until shortly before bringing his action, attempted to obstruct travel over, or assert ownership of, the strip, the finding of the trial court will not be disturbed on appeal. (See, also, Opinion on Motion for Rehearing.)—*Pope v. Alexander*, 82.

Same—Record—Evidence—Review.

6. Where in the record on appeal, in an action to quiet title to a portion of a city lot claimed by defendants to have been dedicated for street purposes, substantial portions of the evidence were unintelligible by reason of the witnesses, when referring to certain points upon plats before them, indicating them by the use of the words "here" and "there," without identification by means of marks or letters, thus making it impossible for the appellate court on a review of the evidence to understand the full purport of their statements, a finding that the strip of land in controversy had become a public highway by prescription will not be said to be contrary to the weight of the evidence. (See, also, Opinion on Motion for Rehearing.)—*Pope v. Alexander*, 82.

Same—Prescription—Findings—Evidence—Sufficiency.

7. While the evidence of a party seeking to establish a public highway by prescription, without color of title, by proof of travel over it for the statutory period, must clearly and convincingly show a use of the
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identical strip of land over which the right is claimed, and travel generally over an uninclosed lot of ground is not sufficient, yet where the evidence tended to show a definite line of travel over such land for a period of twenty-three years, and where the party asserting ownership knew of the conditions existing, but did not attempt to interfere with or question the right acquired by such use, a finding of adverse use for the statutory period will not be overturned on appeal. (See, also, Opinion on Motion for Rehearing.)—*Pope v. Alexander*, 82.

Equity Cases—Scope of Review.

8. (On Motion for Rehearing.) While in equity cases the supreme court, under amended section 21, Code of Civil Procedure (Laws 1903, Second Extra, Session, p. 7), is required "to review all questions of fact arising upon the evidence presented in the record * * * and determine the same," the review may go no further than to determine whether there is a decided preponderance in the evidence against the findings of the trial court, and it will not undertake to try a cause and determine it as does the district court.—*Pope v. Alexander*, 82.

Record—Findings—Evidence—Sufficiency—Presumptions.

9. (On Motion for Rehearing.) Where much of the testimony presented for review, in an action wherein it was sought to establish a street by prescription, was unintelligible by failure of counsel to have witnesses designate by some mode of identification certain points upon maps introduced in evidence, the presumption must obtain that the testimony, thus rendered unintelligible on review, was understood by the court making it, as lending support to its finding in favor of the issue.—*Pope v. Alexander*, 82.

Evidence—Leading Questions.

10. Where the answer to a question was not at all responsive, and a motion to strike it was not made, error assigned on the overruling of an objection to the question as leading will not be considered on appeal.—*Stephens v. Elliott*, 92.

Briefs.

11. Errors specified but not argued in appellant's brief, will not be considered on appeal.—*Stephens v. Elliott*, 92.

Instructions—Refusal—When not Error.

12. The refusal of an instruction relative to a subject substantially covered by one given is not error.—*Stephens v. Elliott*, 92.

Equity Cases—Disposition of, on Appeal.

13. The supreme court must, under Act of 1903 (Laws 1903, 2d Extra. Session, p. 7), on appeal in equity cases review all questions of fact arising upon the evidence presented, and determine the same, unless for good cause shown a new trial or the taking of further evidence be ordered. In a cause of an equitable nature it was held on appeal that the defendant had not made out a case upon which he was entitled to recover, and that therefore the trial court should have found in plaintiff's favor. The cause was remanded "to be proceeded with in accordance with the suggestions" made in the opinion. *Held*, that the district court thereafter properly entered judgment for plaintiff, a new trial or the taking of further evidence not having been ordered.—*Kennedy v. Dickie*, 196.

Evidence—Exclusion—Correct Ruling—Wrong Reason.

14. Where the ruling of the district court in the exclusion of evidence in an action in conversion was correct, the fact that it stated a wrong reason therefor was immaterial.—*Massachusetts Sheep Co. v. Humble*, 201.

Record—Instructions—Review.

15. Where the record in a criminal cause, tried after Chapter 82 of the Laws of 1907, page 197, went into effect, providing that the trial

court shall pass upon any objections to instructions requested or proposed to be given, and that the court stenographer shall be present at the settlement of the instructions and note all objections and exceptions of counsel to those given or refused, does not show that the court ruled, or was requested to rule, on defendant's requests for instructions or his objections to those given, errors relating to them will not be considered on appeal, since error cannot be predicated on the mere silence of the court.—*State v. McCarthy*, 226.

Supreme Court Rules—Binding Upon Whom.

16. The rules of the supreme court, when adopted under the limitations prescribed by section 111, Code of Civil Procedure, have the force of statutes and are binding upon district courts and their officers in so far as such courts and officers have to do with appellate procedure.—*State ex rel. Connors v. Foster*, 278.

Justices of the Peace—Jurisdiction—Appeal—District Courts.

17. Merely because plaintiff, in an action before a justice of the peace, assumed by the recitals in his complaint to secure the cancellation of an alleged forged assignment, and also a judgment on a contract for the payment of money, whereas the justice had not jurisdiction to grant the equitable relief asked, was no reason why his appeal to the district court should have been dismissed for lack of jurisdiction to entertain it, where, after eliminating the equity feature of the complaint (a demurrer to which, interposed by one of the defendants, had been sustained by the justice), it still stated a cause of action of which the justice had jurisdiction; and, hence, the district court had power to proceed.—*Anderson v. Red Metal Min. Co.*, 312.

Notice—"Adverse Party."

18. Under Code of Civil Procedure, section 1760, providing that, when an appeal is taken a notice thereof must be served on the adverse party, etc., an adverse party is one who has an interest in opposing the object sought to be accomplished by the appeal.—*Anderson v. Red Metal Min. Co.*, 312.

Same.

19. Where in an action before a justice of the peace, brought by an assignee on an account, the debtor interpleaded, besides one other, the assignor, who admitted the assignment and disclaimed any interest in the subject matter of the controversy, the latter was not an adverse party, within the meaning of section 1760, Code of Civil Procedure, upon whom it was necessary to serve notice of an appeal to the district court.—*Anderson v. Red Metal Min. Co.*, 312.

Admissibility of Evidence—Harmless Error.

20. Error in admitting evidence on the question of consideration in support of the assignment of an account, when no such question had been made in the case, was harmless, where appellant offered no evidence but rested his case entirely upon his objection to the jurisdiction of the court, which was properly overruled, and where the court was justified in directing a verdict for plaintiff on the written assignment alone.—*Anderson v. Red Metal Min. Co.*, 312.

Proceedings Anterior to Judgment—How Reviewable.

21. Since proceedings had anterior to judgment can be reviewed only on appeal from the judgment or an order denying a new trial, the action of the district court in proceeding with the trial of a civil cause to judgment, after plaintiff had orally asked for a postponement on account of the absence of her attorney, instead of dismissing the action for want of prosecution, was not reviewable on appeal from an order denying plaintiff's motion to set aside the judgment on the

ground of mistake, surprise or excusable neglect.—*Ferguson v. Parrott*, 352.

Motion to Set Aside Judgment—Mistake, etc.—Discretion—Review.

22. A motion to set aside a judgment on the ground of mistake, surprise or excusable neglect being addressed to the discretion of the court, an order refusing such a motion will not be reversed on appeal where no complaint is made that such discretion had been abused in passing upon the affidavits filed in support of the motion and those against it, and where no reference is made in appellant's brief to them, the errors relied on being such as were not reviewable on an appeal from an order of this kind.—*Ferguson v. Parrott*, 352.

Equity Cases—Disposition of, on Appeal.

23. Where the supreme court, on appeal in an equity case, reverses the judgment, but no cause appears why a new trial or the taking of further testimony should be ordered, it will, under the provisions of the Act of 1903 (Laws 1903, Second Extra. Session, p. 7), enter a judgment finally determining the cause.—*North Real Estate L. & T. Co. v. Billings L. & T. Co.*, 356.

Justices of the Peace—Record.

24. In the absence of specific statutory provision on the subject, the original files, together with a copy of the docket minutes, *held*, to constitute the record on appeal, in a criminal cause, from a justice of the peace to the district court.—*In re Graye*, 394.

Justices of the Peace—Criminal Law—Jurisdiction—District Courts.

25. Since the district court on an appeal from a justice's court does not sit as a court of review to correct errors, but is required to try the cause *de novo* upon the merits, the fact that the justice may have lost jurisdiction in trying a criminal case in part on a legal holiday, and in thereafter taking it under advisement instead of entering judgment at the close of the trial, all without objection by defendant, did not deprive the district court of jurisdiction. The justice having had jurisdiction of the subject matter and of the defendant, the appeal clothed the district court with power to proceed, no matter what irregularities may have attended the trial in the lower court.—*In re Graye*, 394.

Mandamus—Appeal—Moot Questions.

26. An appeal from an order granting a writ of *mandamus* to compel the transfer of a cause, the complaint in which charged the violation of a city ordinance, from a police to a justice of the peace court, will be dismissed, where it appears that the mandate of the district court had been fully complied with on the day the appeal was taken, and that the only purpose sought by it was a decision upon a moot question relative to jurisdiction.—*State ex rel. Brass v. Horn*, 418.

Appeal—Its Purpose.

27. The purpose of an appeal is to relieve a party who has been aggrieved by the judgment or order complained of, and to restore him to the position which he occupied in the controversy before the judgment was rendered or the order made.—*State ex rel. Brass v. Horn*, 418.

Mandamus—Stay—Supersedeas.

28. Even if a stay, in a case where a writ of mandate is issued by the district court to compel the transfer of a cause from a police to a justice of the peace court, is not provided for in the Code of Civil Procedure (a question not decided), still the supreme court has power, under section 3, Article VIII of the Constitution, to issue a *supersedeas*, or any other appropriate writ, to effectuate its appellate jurisdiction, and thus to insure to the aggrieved party an appeal which might otherwise be of no value.—*State ex rel. Brass v. Horn*, 418.

Nonappealable Orders.

29. An order authorizing the payment of a fund deposited in court in condemnation proceedings to the person entitled thereto is not a special order after final judgment from which an appeal may be taken.—*Chicago etc. Ry. Co. v. White*, 437.

Same.

30. Nor is the above order one directing the delivery, transfer or surrender of property, within the meaning of section 1722 of the Code of Civil Procedure as amended (Laws 1899, p. 146), authorizing an appeal.—*Chicago etc. Ry. Co. v. White*, 437.

Right to Appeal.

31. To entitle a person to an appeal, he must have been aggrieved by an order or judgment of a court.—*Chicago etc. Ry. Co. v. White*, 437.

New Trial—Surprise—Record—Different Results.

32. Where, on appeal from an order denying a new trial, asked for on the ground of surprise, occasioned by the testimony of witnesses relied on by appellant to prove his contention, the evidence given at the trial is not incorporated in the record, the supreme court will not order a reversal, since, even conceding that the new witnesses would testify as stated in the movant's affidavit filed in support of the motion, it cannot say that the result reached at the trial would probably be different if a new one were granted.—*Hill v. McKay*, 440.

New Trial—Order—Affirmance.

33. If a party was entitled to a new trial upon any one of a number of grounds urged by him on motion for a new trial, the order granting it will be affirmed, though based upon a ground devoid of merit.—*Harrington v. Butte, Anaconda & Pac. Ry. Co.*, 478.

Theory of Case.

34. On appeal the supreme court will treat a cause on the same theory it was tried in the district court.—*Carlson v. Barker*, 486.

Evidence—Objections not Raised in District Court.

35. An objection to the introduction of testimony not urged in the district court will not be reviewed on appeal.—*O'Flynn v. City of Butte*, 493.

False Imprisonment—Conflicting Evidence—Review.

36. Where the evidence on the question of the false imprisonment of plaintiff was conflicting and sufficient to have justified a finding in favor of either party to the action, the verdict of the jury will not be disturbed.—*Kroeger v. Passmore*, 504.

Nonsuit—Effect in Law Actions.

37. The effect of granting a nonsuit in an action at law is to declare that the evidence is insufficient to warrant a verdict for plaintiff under any circumstances; hence the judgment should be reversed on appeal, if there was any evidence justifying a verdict for plaintiff.—*Stevens v. Trafton*, 520.

Equity Cases—Final Disposition—Practice.

38. Since the evident purpose of the Act of 1903 (Laws 1903, 2d Extra. Session, p. 7), requiring the supreme court to determine all questions of fact as well as of law in equity cases, unless for good cause a new trial or the taking of further testimony be ordered, is to expedite the entry of final judgment in such cases, and thus put an end to litigation, it is the duty of the parties to introduce all their testimony in the trial court, in order to enable the appellate tribunal to carry out the intention of the Act.—*Stevens v. Trafton*, 520.

Same.

39. On appeal in equity cases, defendant's motion for judgment at the conclusion of plaintiff's case will be construed as a declaration

that, in case his motion is granted, he elects to stand upon the case made by plaintiff, and final judgment on appeal will be entered accordingly, and new trials in such cases will not be ordered except for good cause shown in the record.—*Stevens v. Trafton*, 520.

Joint Appeal—Effect.

40. Where two defendants jointly moved for a new trial, the question, raised by one, that the evidence was insufficient to sustain the verdict as against him, will not be considered on appeal.—*Parnell v. Davenport et al.*, 571.

Record—Failure to File in Time—Dismissal.

41. An appeal will be dismissed where appellant fails to file his transcript within the time allowed by the rules of the supreme court.—*Courtney v. McGrath et al.*, 622.

ARRAIGNMENT.

See Criminal Law, 68.

ASSIGNMENT.

Choses in Action—Duebills.

1. Defendants were assignees of moneys to be made out of certain wood contracts. Plaintiff, an employee of the assignor, procured from the latter an order on defendants for wages due him. On presentation of the order defendants took an assignment from plaintiff of all moneys due him for wages, and paid part of the order in cash and gave him a duebill for the balance. In an action on the duebill, *held*, that the transaction between plaintiff and defendants amounted to an assignment of a chose in action, and that judgment for plaintiff was proper.—*Parnell v. Davenport et al.*, 571.

Same—Consideration.

2. The promise to pay the duebill referred to in the foregoing paragraph was supported by a sufficient consideration, under sections 2160, 2161, Civil Code, since by taking plaintiff's assignment of wages due him, defendants gained the advantage of having his possible statutory lien out of the way of asserting their claim under the employer's assignment to them.—*Parnell v. Davenport et al.*, 571.

ATTORNEYS.

Personal Injuries—Reading Mortality Tables.

1. An attorney, not sworn as a witness, may read to the jury standard mortality tables in a personal injury case.—*Stephens v. Elliott*, 92.

BANKRUPTCY.

Mortgages—Sales After Petition—Effect.

1. On June 9, 1902, a petition was filed in the United States district court to have a mortgagor of certain chattels declared a bankrupt. At this time the mortgagee was in possession of the property. On June 10th the mortgagor and mortgagee transferred their respective interests in the chattels to a company formed on the day preceding, receiving therefor shares of its stock. Subsequently the mortgagor was adjudged a bankrupt. The receiver, who later was appointed as trustee in bankruptcy, on June 12th commenced an action in claim and delivery to recover possession of the chattels transferred to the company. *Held*, that the company by the transaction did not simply step into the shoes of the mortgagee, but discharged his claim and left the chattels free from the mortgage lien, and that the sale of the chattels, made after the filing of the petition in bankruptcy and before final adjudication, was voidable at the election of plaintiff trustee.—*Hamilton v. Smith*, 1.

Mortgages—Merger.

2. Assuming that the mortgagor, referred to in the foregoing paragraph, sold his interest in the chattels to the company, and the mortgagee assigned his mortgage debt to it at the same time, the lien ceased to exist in that case also, since the lesser estate—the mortgage lien—became merged in the greater, represented by the legal title conveyed by the mortgagor.—*Hamilton v. Smith*, 1.

Filing of Petition—Caveat.

3. The filing of a petition in bankruptcy is in effect a *caveat* and gives notice to all the world; so that a sale of property belonging to a bankrupt, when made after the filing of such a petition and before final adjudication, is voidable at the option of the trustee in bankruptcy.—*Hamilton v. Smith*, 1.

Decisions of Supreme Court of United States—Conclusiveness.

4. In construing the provisions of the Bankruptcy Act, a decision of the supreme court of the United States directly applicable to the question presented to a state court, is conclusive.—*Hamilton v. Smith*, 1.

Creditors—Preference—Findings—Evidence—Sufficiency.

5. Evidence adduced in an action by a trustee in bankruptcy to recover a sum of money alleged to have been paid to defendant by his brother, a bankrupt, in preference over other creditors, when defendant had reasonable cause to believe that a preference was intended, examined and *held* to justify a finding that defendant did not have reasonable cause to believe that the bankrupt, when making payment, intended to give him a preference over other creditors.—*Mackel v. Bartlett*, 7.

Creditors—Preference—Proof.

6. For a trustee in bankruptcy to succeed in an action to recover the amount of an alleged preference, it is incumbent upon him to prove that defendant had reasonable cause to believe that his debtor, in making payment, intended to give him a preference, and that the debtor was then in fact insolvent; hence, mere grounds of suspicion on the part of the creditor that his debtor is in failing circumstances, or is insolvent, are not sufficient to avoid a payment to such creditor, even though it had the effect of giving him a preference over other creditors.—*Mackel v. Bartlett*, 7.

BANKS AND BANKERS.

See Criminal Law, 41.

BENEFIT SOCIETIES.

See Insurance.

BONA FIDE PURCHASER.

See Fixtures, 4, 5.

BRIEFS.**Appeal—Errors—Specifications.**

1. Errors specified but not argued in appellant's brief, will not be considered on appeal.—*Stephens v. Elliott*, 92.

Appeal—Rules.

2. A brief which substantially complies with Rule X of this court, with relation to its contents, is sufficient.—*McIntosh v. Jones*, 467.

BURDEN OF PROOF.

Promissory Notes—Nonpayment—Instructions.

1. Instructions, given in an action on a promissory note, that if it appeared by a preponderance of the evidence that payment had not been made, plaintiff was entitled to recover, and that, on the contrary, if it appeared in the same way that payment had been made, the defendants were entitled to a verdict, were not objectionable as casting the burden of proving nonpayment upon plaintiff, or because of the absence of a statement as to what should be done in case of an equipoise in the evidence on the issue of payment, and could not have misled the jury, where in other parts of the charge they had been told that the burden was upon defendants to establish payment by a preponderance of the evidence, and that plaintiff's possession of the note was to be considered by them as *prima facie* evidence that it had not been paid.—*McCauley v. Darrow*, 13.

Contributory Negligence—Assumption of Risk—Instructions.

2. Instructions, given in an action to recover damages for personal injuries, charging the jury that the burden of proof to establish the defenses of contributory negligence and assumption of risk was upon defendant, were correct, where the evidence on the part of plaintiff did not show, or tend to show, that his negligence contributed to his injury, or that he assumed the risk incident to his employment.—*Stephens v. Elliott*, 92.

Criminal Law—Alibi—Instructions.

3. Where the jury in a criminal cause had been properly instructed that the burden of proving, beyond a reasonable doubt, that defendant was present and participated in the alleged crime, a subsequent one stating simply that one of the defenses interposed by defendant was an *alibi* and defining that term, was not objectionable as impliedly casting the burden of proving that defense upon the defendant.—*State v. Paisley*, 237.

Fraternal Insurance—Delinquency—Reinstatement.

4. Where one, insured under a contract with a fraternal insurance order, had become delinquent by failure to pay his dues and premium at a specified time, and, upon insured's death, his beneficiary relied for recovery upon a condition subsequent, to wit, decedent's reinstatement prior to his death, which was denied in the answer—she assumed the burden of proof upon that issue.—*Kennedy v. The Grand Fraternity*, 325.

Waters—Ditches—Injury—Seepage—Actions—Trespass on the Case.

5. Where, in an action to recover damages for injury alleged to have been caused to plaintiff's lands by seepage from defendant's ditch, it was not contended that the seepage was intentionally caused by defendant, nor claimed by the latter that it was the result of inevitable accident or an act of God, the injury, if it occurred at all, must have been the result of negligence on defendant's part in constructing or operating the ditch, and the action was maintainable only as an action of trespass on the case, in which the burden of proving defendant's negligence, in the first instance, was upon plaintiff.—*Fleming v. Lockwood*, 384.

Contributory Negligence.

6. Where, in an action for personal injuries, contributory negligence is properly pleaded as a defense, the burden of proving it rests upon defendant, and plaintiff is not called upon to show that his own heedlessness was not the cause of his injury.—*Birsch v. Citizens' Electric Co.*, 574.

BURGLARY.

See Criminal Law, 10-14.

CANCELLATION OF DEEDS.

See Equity, 2, 4.

CAVEAT.

Bankruptcy—Filing of Petition.

1. The filing of a petition in bankruptcy is in effect a *caveat* and gives notice to all the world; so that a sale of property belonging to a bankrupt, when made after the filing of such a petition and before final adjudication, is voidable at the option of the trustee in bankruptcy.—*Hamilton v. Smith*, 1.

CHANGE OF VENUE.

See Police Courts, 1.

CHATTEL MORTGAGES.

See Mortgages, 1.

CHOSSES IN ACTION.

See Assignment.

CITIES AND TOWNS.

See Municipal Corporations.

CLAIM AND DELIVERY.

Chattels—Fixtures—Realty.

1. Where one wrongfully attaches to his realty another's chattels, and without the latter's knowledge or consent, such chattels may be reclaimed in an action in claim and delivery, if they can be identified.—*Eisenhauer v. Quinn*, 368.

CLERK OF DISTRICT COURT.

Seal—Mandatory Statutes.

1. The provisions of section 4645 of the Political Code, prescribing, among other things, that the clerk of the district court when issuing jurors' certificates, must impress his seal upon them, are mandatory, as are also those of section 4350, relative to how county moneys must be disbursed by the county treasurer.—*In re Farrell*, 254.

Criminal Law—Appeal—Record—Mandamus.

2. *Held*, on application for writ of mandate, that the clerk of the district court must, as soon as a notice of appeal in a criminal cause is filed with him, proceed to prepare a copy of the record and other papers enumerated in section 2281, Penal Code, and transmit same within ten days from the date of the notice, or, in case there be a bill of exceptions to be settled, then within ten days of the date of settlement, to the clerk of the supreme court without charge to appellant, and that a praecipe enumerating the papers constituting such technical record need not be lodged with the clerk.—*State ex rel. Connors v. Foster*, 278.

Criminal Law—Appeal—Record—Rules of Supreme Court.

3. The copy of the record which the clerk of the district court is required, by section 2281, Penal Code, to prepare upon the filing of a notice of appeal in a criminal cause, and transmit to the clerk of the supreme court, must meet the requirements of Rule VI, subdivision 2, and Rule VII of the appellate court, relative to the preparation and arrangement of transcripts on appeal.—*State ex rel. Connors v. Foster*, 278.

Same—Record on Appeal—Compensation.

4. *Quære*: Is the clerk of the district court entitled to compensation from his county for the performance of the duty imposed upon him by section 2281, Penal Code, and the Rules of the supreme court, to furnish a copy of the record on appeal in a criminal cause in proper form?—*State ex rel. Connors v. Foster*, 278.

COMMON LAW.**Principles—Applicable Under Codes.**

1. While by the adoption of the Codes the common-law forms of pleading were abolished in this state, the fundamental principles of that law underlying the various actions must still be looked to in determining questions relating to such actions.—*Fleming v. Lockwood*, 384.

Trespass—Trespass on the Case.

2. The action of trespass presumes the doing of an act wantonly or in total disregard of another's rights; whereas, the action of trespass on the case assumes that the injury complained of is the result of negligence or nonfeasance.—*Fleming v. Lockwood*, 384.

Homicide—Information—Sufficiency.

3. Allegations sufficient for a common-law indictment for murder suffice for an information under the Code.—*State v. McGowan*, 422.

CONSIDERATION.

See Assignment, 2; Statute of Frauds, 1.

CONSTITUTION.

See, also, Statutes and Statutory Constructions, 1-12.

Power of Legislature.

1. The state Constitution being a limitation upon, and not a grant of, legislative power, such power is supreme, in the absence of a specific prohibition in that instrument or the use of words which imply a prohibition.—*Evers v. Hudson*, 135.

Schools—Power of Legislature.

2. Section 1, Article XI, of the Constitution commands the legislature to make provision for a general, uniform and thorough system of public free common schools. Section 11 of the same Article provides for the supervision and control of the state educational institutions. *Held*, that these provisions are not exclusive so as to limit the legislative power to the establishment and maintenance of common schools and state institutions only, but that other schools, such as county free high schools, may be established under these sections.—*Evers v. Hudson*, 135.

Railways—Liability to Employees—Statutes—Equal Protection of Laws.

3. *Held*, that the enactment of Chapter 83 of Laws of 1903, page 156, relative to the liability of railway corporations for damages sus-

tained by an employee by reason of the negligence of certain of his therein enumerated coemployees, is a valid exercise of legislative power, under Article XV, sections 2 and 3 of the Constitution, reserving to the state the right to alter or amend corporate charters theretofore granted; and that, therefore, the Act is not open to the objection that it deprives railway corporations of the equal protection of the laws, guaranteed to all under the Fourteenth Amendment to the United States Constitution, by subjecting them to liabilities not imposed upon natural persons or other corporations engaged in the same pursuit.—*Lewis v. Northern Pac. Ry. Co.*, 207.

Same—Statutory Construction—Equal Protection of Laws.

4. The general purpose of the Act above, being to protect railroad employees in their particularly hazardous employment, it might be held not to violate the equal protection of the law clause of the United States Constitution, under the rule of statutory construction that, where the general purpose of a statute has been ascertained, general words may be restricted to a particular meaning, or those of a restricted meaning expanded so as to embrace the general purpose and effectuate it—by holding, that the expression "railway corporation," therein found, includes all persons, both individual and corporate, engaged in operating railways.—*Lewis v. Northern Pac. Ry. Co.*, 207.

Railroads—Interstate Commerce—Regulating Hours of Labor—Power of Legislature.

5. In the absence of legislation by Congress on the matter of regulating the hours of labor, etc., of certain railway employees in this state, even though engaged in interstate commerce, such regulation was a matter of state control under the exercise of its police power; hence the Act of February 5, 1907 (*Laws 1907*, p. 6), making such provision and providing penalties for violation thereof, was not an attempt to regulate interstate commerce in contravention of the federal Constitution.—*State v. Northern Pacific Ry. Co.*, 582.

CONSTITUTION OF MONTANA.

(List of Sections Cited or Commented upon.)

Article V, section 23	142, 143
Article V, section 32	146
Article VII, section 12	153
Article VIII, section 3	421
Article VIII, section 15	421
Article VIII, section 20	180
Article VIII, section 21	318
Article VIII, section 28	319
Article IX, section 2	151
Article XI, section 1	149, 150
Article XI, section 11	149
Article XV, section 2	219
Article XV, section 3	219
Article XV, section 11	222

CONSTRUCTIVE NOTICE.

See Insurance, 13.

CONTRACTS.

See, also, Insurance; Specific Performance.

Illegality—Procurement of Testimony—Public Policy.

1. A contract by the terms of which plaintiff in effect agreed, for a consideration of \$50,000, to furnish evidence which would enable

defendant to either win two certain suits, or one of them, upon trial, or which would put the latter in such a position that he could force a favorable settlement of one or both of them, had a tendency to impede the due administration of justice and was, therefore, void as against the policy of the law.—*Hughes v. Mullins*, 267.

When not Severable.

2. Nor did a certain paragraph of the above contract constitute an independent agreement, not prohibited by law, when it provided that the knowledge plaintiff had of any testimony should be considered of sufficient value for the consideration of the "aforesaid sum of money" whether such testimony was used in court or not. Standing alone this portion of the contract was meaningless, while, if taken in connection with the remaining portion of it, it became plain. The agreement was not severable.—*Hughes v. Mullins*, 267.

When not Severable—Single Consideration.

3. The consideration for the contract set forth in the foregoing paragraph having been the lump sum of \$50,000, and not a portion of that amount for certain acts and another portion for other things done, the contract was not severable, under the rule that, where the consideration to be paid for the performance of a contract is single and entire, the contract itself will be held entire and not severable, even though the subject of it should consist of several distinct and independent items.—*Hughes v. Mullins*, 267.

CONTRIBUTORY NEGLIGENCE.

See *Personal Injuries*, 15-17, 19, 20, 38, 42, 43, 44, 46, 47.

CONVERSION.

Sheep—Chattel Mortgages—Description—Identification—Evidence.

1. The description of a band of sheep in a mortgage, was "1,000 head of sheep on the range of Medicine Lodge creek, in Fremont county, Idaho, together with the wool and increase." The sheep were thereafter purchased from the mortgagor and incorporated in the buyer's band. The mortgagee thereafter, under foreclosure proceedings, had the sheep, alleged to have been mortgaged, seized and sold. In an action in conversion the defendant offered the above mortgage in evidence, together with the proceedings had by the sheriff. This evidence was excluded. *Held*, that in excluding the evidence the court acted properly, the description in the mortgage being wholly insufficient to identify the subject thereof, and that, therefore, no additional evidence in this respect having been offered, defendant had failed to connect himself with the mortgagor's title, and in seizing them, occupied the position of a naked trespasser.—*Massachusetts Sheep Co. v. Humble*, 201.

Complaint—Sufficiency.

2. A complaint, which alleges that defendants, at a certain time and place, combined and conspired together to hinder and defraud plaintiff in her rights in her husband's property; that, while she had an action pending against her husband for separate maintenance, they wrongfully took and carried away certain sheep then and there the property of her husband and in his possession, does not state a cause of action for conversion; for in such an action plaintiff must allege and prove a general or special ownership in the property and a right to the immediate possession of it at the time of the unlawful taking.—*Raymond v. Blancgrass*, 449.

Complaint—Sufficiency.

3. The complaint of a wife, who had obtained a decree against her husband for separate maintenance, in an action to recover damages from third persons for conspiracy, alleged to have been entered into with a view to defeat any decree she might obtain, by removing and disposing of her husband's chattels, was insufficient where it did not appear therefrom that she had any special right in the property, and where the conversion occurred prior to the time she became her husband's creditor by the entry of the decree in the suit for separate maintenance.—*Raymond v. Blanegrass*, 449.

CORPORATIONS.**Charters—Power of Legislature to Amend.**

1. While corporations are persons, they are not such for all purposes. They have no inalienable rights. Being creatures of the statute, the legislature may, under the Constitution (Art. XV, secs. 2, 3), enact any legislation by way of amendment of the law creating them, which does not violate the rule that property acquired under the operation of their charters cannot be taken away, and that contracts made in like manner may not be impaired.—*Lewis v. Northern Pac. Ry. Co.*, 207.

Power of Legislature to Destroy.

2. *Obiter*: Under the right reserved to the state by sections 2 and 3, Article XV of the Constitution, the legislature may not only alter corporate charters, but may, if deemed expedient, destroy the corporate body.—*Lewis v. Northern Pac. Ry. Co.*, 207.

Foreign—Privileges.

3. Foreign corporations doing business in the state are not entitled to any greater rights than are enjoyed by domestic corporations engaged in the same kind of business. (Const., Art. XV, sec. 11.)—*Lewis v. Northern Pac. Ry. Co.*, 207.

COSTS.**Improper Allowance—Mechanics' Liens.**

1. Under section 1863 of the Code of Civil Procedure, prescribing the costs allowable in a suit to foreclose a mechanic's lien, it was error to allow items charged for preparation and verification of the lien and for abstract of title to the property covered by the lien.—*Newman v. Grant*, 77.

COUNTERCLAIMS.**Justices of the Peace—Appeal—Nonsuit.**

1. Where defendant, in an action before a justice of the peace failed to set up a then subsisting counterclaim upon which an action might have been brought in that court, he could not, under sections 1524 and 1525 of the Code of Civil Procedure, thereafter on appeal to the district court have it adjudicated, and a motion for nonsuit on the ground that by his failure he was barred from securing any relief was properly sustained.—*Walter v. Cox*, 20.

COUNTIES.**Tax Deeds—Competitive Bidders—Effect.**

1. A tax deed which showed on its face that a county had been a competitive bidder at a sale for delinquent taxes, contrary to the provisions of section 3882 of the Political Code, is void.—*Rush v. Lewis & Clark County et al.*, 566.

Same—Recitals.

2. The recitals in a tax deed must show affirmatively that the county had a right to take the property and that it was not a competitive bidder at the sale.—*Rush v. Lewis & Clark County et al.*, 566.

Same—Statutes—Strict Construction.

3. A county cannot purchase lands at a tax sale unless authorized to do so by law, and the provisions of the statute relative to sales for delinquent taxes must be strictly pursued before the owner can be divested of title.—*Rush v. Lewis & Clark County et al.*, 566.

Same—Invalidity—Presumptions.

4. Where a tax deed showed its invalidity upon its face, in that the county had been a competitive bidder at the sale contrary to statute, the presumption that official duty had been regularly performed will not protect a grantee of the county, nor may in such a case the provisions of section 3897, Political Code, making tax deeds *prima facie* evidence of the fact, among other things, that the property was sold as prescribed by law, be relied upon.—*Rush v. Lewis & Clark County et al.*, 566.

COUNTY ATTORNEYS.

Misconduct.

1. The county attorney, in a prosecution for homicide, asked a witness whether he had a conversation with deceased a short time prior to the killing, in which deceased accused defendant of the crime of larceny. The court not only sustained an objection to the question, but instructed the jury to disregard it. The county attorney thereafter did not persist in propounding incompetent questions. *Held*, that no prejudicial error resulted from putting the question.—*State v. McGowan*, 422.

COUNTY COMMISSIONERS.

Sheriffs—Deputies—Power of Appointment.

1. The Act of 1905, amendatory of section 4597 of the Political Code (Laws 1905, p. 164), providing, among other things, that the sheriff in a third-class county shall be allowed two deputies, and that such officer "may appoint two deputies * * * who shall act as jailers," does not, by the latter provision, create a new class of deputies, separate and distinct from those first referred to, or lodge in the sheriff exclusively the power of appointment without the consent or approval of the board of county commissioners, but simply amounts to an increase of the maximum number he may appoint, subject to the approval of the board, as provided by Act of 1893 (Sess. Laws 1893, p. 60), which Act was not repealed by implication by any provision of the Political Code thereafter adopted.—*Hogan v. Cascade County*, 183.

Injunction—Printing Contracts—Validity.

2. *Held*, on an appeal from an order refusing to dissolve an injunction, that, under Political Code, sections 4230 (subd. 20) and 4233, a contract made by a board of county commissioners, a few weeks before the expiration of its term of office and upon the expiration of a prior contract, for county printing for the two succeeding years, was valid, in the absence of fraud in its making, and binding upon the incoming board.—*Picket Pub. Co. v. Board of County Commrs.*, 188.

Same—Public Policy.

3. Nor was the contract above referred to void as against public policy.—*Picket Pub. Co. v. Board of County Commrs.*, 188.

Powers—Abuse.

4. The mere fact that the power conferred by section 4230 and 4233 of the Political Code upon boards of county commissioners to let

contracts for county printing for a term of two years, may be abused, is not of itself a sufficient reason for holding that such power does not exist or ought not to be exercised.—*Picket Pub. Co. v. Board of County Commrs.*, 188.

COUNTY FREE HIGH SCHOOLS.

See Statutes and Statutory Construction, 1-12; Elections. 1. 3.

COUNTY PRINTING.

See County Commissioners, 2-4.

CREDITORS.

Preference of,—see Bankruptcy.

Preventing Satisfaction of Claims.

1. A judgment creditor who has been prevented from having satisfaction of his claim by the wrongful act of a third person, acting with or independently of the debtor, may maintain an action for damages against such person for the value of the property put beyond the creditor's reach.—*Raymond v. Blancgrass*, 449.

Same—Special Injury.

2. A judgment creditor has no cause of action against one who has conspired to defeat his judgment, unless he can show some special injury different from that suffered by other creditors.—*Raymond v. Blancgrass*, 449.

Causes of Action in Favor of Debtor—Suit.

3. A creditor cannot, solely on the ground that he is a creditor, and that his debtor has no property other than an existing cause of action at law, bring suit upon such cause of action and obtain a judgment thereon as if he were the owner of it.—*Raymond v. Blancgrass*, 449.

CREDITORS' BILLS.

Complaint—Insufficiency.

1. A complaint which alleged that the defendants conspired together, pending a suit by plaintiff against her husband for separate maintenance, to defraud plaintiff of her rights in her husband's property and to render ineffective any decree she might obtain against him, but failed to state that the husband assisted in fraudulently disposing of or concealing it, or that plaintiff had acquired a lien on the chattels, or that a trust therein existed in her favor, had none of the attributes of a creditor's bill; nor was it good as a bill of discovery.—*Raymond v. Blancgrass*, 449.

Adequacy of Remedy at Law.

2. *Held*, that a wife who had obtained a judgment against her husband for separate maintenance had a plain, speedy and adequate remedy at law by execution against persons alleged to have fraudulently conspired to defeat any decree she might obtain by disposing of the husband's property, and that therefore she could not sue in equity by way of a creditor's bill.—*Raymond v. Blancgrass*, 449.

CRIMINAL LAW.

Definition of "Larceny"—Intent—Instructions.

1. In a prosecution for grand larceny, the court gave as a definition of "larceny" the language of section 880 of the Penal Code. The jury were further told that in every crime or public offense there must

exist a union or joint operation of act and intent. It further charged that to find the defendant guilty it was sufficient to show that he had appropriated the property mentioned in the information "without color of right or authority." *Held*, that these instructions were erroneous, for the reason that they omitted the element of felonious or criminal intent.—*State v. Peterson*, 109.

Intent—Instructions—Curing Error.

2. The error, committed in charging that the defendant, accused of grand larceny, could be found guilty if he appropriated the property "without color of right or authority," was not cured by the addition of the words "and with intent to steal the same," since the word "steal" could not have been understood by the jury as having any broader import than that given to the term "larceny" by the court in the instruction referred to in the above paragraph.—*State v. Peterson*, 109.

False Pretenses—Attempt—Elements—Information—Sufficiency.

3. The crime of attempting to obtain money by false pretense is complete whenever the false representation is made, with the requisite criminal intent, under such circumstances that, if the thing of value had been obtained, a deprivation would have been the result; the information need not, therefore, allege that the person attempted to be defrauded believed the representation, nor that the fraud was completed. *State v. Phillips*, 112.

Same—Information—Sufficiency.

4. An information charging an attempt to obtain money by false pretenses, which alleged that defendant willfully, unlawfully and falsely pretended to one P., residing in Massachusetts, and to the manager of a telegraph office, that he was a brother of P., and did then and there send a telegram to said P. asking for \$100 to enable him to return home, and that he was ill, with intent to cheat and defraud, etc., "whereas defendant then knew that said pretenses were false," and that "by color and means of said false pretenses," etc., he attempted to obtain from P. and others said sum of money, by fair intendment negated the truth of the representation made by defendant that he was the brother of P. (Mr. Chief Justice Brantly dissenting.)—*State v. Phillips*, 112.

Same—Information—Sufficiency.

5. The charge in the information referred to in the paragraph above that defendant willfully, unlawfully and falsely pretended to P. that he was his brother, etc., sufficiently set forth the facts constituting the attempted fraud, even though it be assumed that the pleader intended to allege that the fraudulent representations were made by means of a telegram, but failed to so state in appropriate terms. (Mr. Chief Justice Brantly dissenting.)—*State v. Phillips*, 112.

Same—Information—Sufficiency.

6. Nor was the above information objectionable on the ground that it did not contain a statement of facts constituting the offense in ordinary and concise language, so as to enable a person of common understanding to know what was intended to be charged, or that it was not direct and certain in its statements, as required by sections 1832 and 1834 of the Penal Code. (Mr. Chief Justice Brantly dissenting.)—*State v. Phillips*, 112.

Same—Information—Surplusage.

7. Even though the information above was defective in form, and contained many immaterial averments, these objections could not have prejudiced the defendant, and were insufficient to work a reversal, under the provisions of sections 1842, 2600 and 2320 of the Penal Code. (Mr. Chief Justice Brantly dissenting.)—*State v. Phillips*, 112.

Same—Instructions—Refusal—Evidence—Record.

8. In the absence of the evidence from the record on appeal in a criminal cause, the refusal to give a requested instruction will not be held erroneous, unless such refusal was error under any supposable state of facts which might have been presented by the evidence.—*State v. Phillips*, 112.

Same—Precautionary Instruction—Discretion.

9. In a prosecution for crime it is discretionary with the trial court to give or refuse an instruction cautioning the jury as to the duty of each member thereof not to vote for a verdict of guilty, if he entertain a reasonable doubt, merely because a majority should be in favor of such a verdict, and not to yield his conscientious convictions as to the guilt or innocence of the accused to the will of the majority for the sake of humanity or to prevent a mistrial.—*State v. Phillips*, 112.

Burglary—Entry—Information.

10. Under Penal Code, section 820, providing that every person who enters any house, room, etc., with intent to commit grand or petit larceny or any felony, is guilty of burglary, the act of entry, to constitute the crime, must be itself a trespass; therefore the information should negative the idea that the defendant at the time of entry had the right to enter.—*State v. Mish*, 168.

Same—Entry—Ownership of Building—Information.

11. While the ownership of the room or building, charged in an information for burglary to have been entered by defendant, need not be specifically alleged, it is the safer practice to do so, if known to the pleader.—*State v. Mish*, 168.

Same—Entry—Information—Attempt.

12. An information alleging that defendant "willfully, unlawfully and feloniously" attempted to "willfully, unlawfully and feloniously enter" a certain room in a lodging-house, with intent to commit larceny, sufficiently negated the idea that at the time of entry he had a right to enter, and stated facts sufficient to constitute an attempt to commit burglary.—*State v. Mish*, 168.

Same—Information.

13. Since under Penal Code, section 820, it is burglary to enter a house or room with intent to commit petit as well as grand larceny, the contention of appellant that the charge in the information referred to in the above paragraph, that accused attempted to enter "with intent to commit larceny," should be construed to mean petit larceny only, and that therefore the value of the articles sought to be stolen should have been alleged, has no merit.—*State v. Mish*, 168.

Same—Degree of Crime—Determination by Court—Appeal—Record—Presumptions.

14. The jury, in finding a verdict of guilty of the crime of attempted burglary, left the punishment to be fixed by the court. While the crime of burglary is divided into first and second degrees, and in such case the jury must find the degree, an attempt to commit that offense is not so divided. The court, under section 1230, subdivision 1, Penal Code, imposed a sentence of seven and one-half years in the state's prison, one-half the maximum punishment authorized for the crime of burglary in the first degree. The evidence was absent from the record on appeal. *Held*, that in the absence of the testimony, it will be presumed that the court had evidence before it justifying a finding that, if guilty at all, the defendant was guilty of an attempt to commit burglary in the night-time, which constitutes the first de-

gree of the offense, and that the punishment inflicted was proper. (Mr. Chief Justice Brantly dissenting.)—State v. Miah, 168.

Evidence—Insufficiency—Duty of Court.

15. Where, in a criminal cause, there is no substantial evidence to support a verdict of guilty, it becomes the duty of the district court, as a matter of law, to vacate and set it aside, and refusal so to do is reversible error.—State v. McCarthy, 226.

Grand Larceny—Evidence—Insufficiency—Review.

16. Evidence examined and held insufficient to sustain a conviction of the crime of grand larceny.—State v. McCarthy, 226.

Evidence Necessary to Convict.

17. Mere suspicions or probabilities, however strong, are insufficient to convict of crime. There must be some substantive testimony to justify a judgment of conviction.—State v. McCarthy, 226.

Grand Larceny—Accomplices—Evidence—Intent.

18. The testimony of a woman, an alleged accomplice of defendant charged with grand larceny, relative to an understanding she had with him that, when present in a winerom adjacent to defendant's saloon, she was to induce men to drink excessively so as to more readily be able to get hold of their money, was competent as tending to show a system or plan uniformly pursued, and thus to show guilty knowledge or criminal intent.—State v. McCarthy, 226.

Evidence—Accomplices—Corroboration.

19. Under Penal Code, section 2089, the testimony of an accomplice is insufficient to support a conviction, unless corroborated by other evidence which, in itself and independently of that of the accomplice, tends to connect the accused with the crime alleged to have been committed.—State v. McCarthy, 226.

Grand Larceny—Evidence—Cross-examination.

20. In a prosecution for grand larceny where the prosecuting witness claimed to have been deprived of his property while in the winerom adjoining defendant's saloon with an alleged female accomplice of defendant, it was error to refuse permission to defendant's counsel, on cross-examination of the woman, to interrogate her as to whether the complaining witness had an act of sexual intercourse with her on the floor of the room. The offered testimony was competent as showing what opportunity the woman had to take the money without the aid or knowledge of the defendant.—State v. McCarthy, 226.

Record—Review—Instructions.

21. Where the record in a criminal cause, tried after Chapter 82 of the Laws of 1907, page 197, went into effect, providing that the trial court shall pass upon any objections to instructions requested or proposed to be given, and that the court stenographer shall be present at the settlement of the instructions and note all objections and exceptions of counsel to those given or refused, does not show that the court ruled, or was requested to rule, on defendant's requests for instructions or his objections to those given, errors relating to them will not be considered on appeal, since error cannot be predicated on the mere silence of the court.—State v. McCarthy, 226.

Robbery—Taking of Property Without Resistance.

22. *Obiter*: The taking of personal property from the person or immediate presence of another without resistance on his part does not bring the offense within the definition of robbery. (Pen. Code, sec. 390.) To constitute the crime the element of force or fear must be present.—State v. Paisley, 237.

Same—Information—Degree of Force.

23. Since section 390 of the Penal Code does not define the degree of force necessary to constitute the taking of personal property from the

person or immediate presence of another the crime of robbery, an information charging such offense need not allege the degree of force used in accomplishing it.—State v. Paisley, 237.

Same—Force or Fear—Information—Sufficiency.

24. Assuming that an information charging robbery was defective in not stating facts sufficient to allege fear, within the statutory definition (Pen. Code, sec. 391), on the part of the person robbed, still, the allegation of force, the alternative element of the crime, having been sufficient, the pleading was not vulnerable to attack.—State v. Paisley, 237.

Prior Convictions—Information—Essentials.

25. In an information charging, *inter alia*, a prior conviction of an offense in another state which, in this state, is punishable by imprisonment in the state prison, it is unnecessary to allege the facts constituting the crime in the foreign state, and it is immaterial whether the offense for which defendant is alleged to have been previously convicted in the sister state is a felony there. It is sufficient, under section 2146 of the Penal Code, to allege the fact of defendant's prior conviction of a named offense, indicating the court which rendered the judgment and the date thereof.—State v. Paisley, 237.

Robbery—Prior Convictions—Information—Harmless Error.

26. Defendant was charged with robbery and prior convictions in Colorado of the crimes of burglary and assault to rob. The latter crime is not known under the Penal Code of this state. The prior conviction of burglary was sufficiently alleged. The jury found a verdict of guilty and that the charges of both prior convictions were true. *Held*, that, even assuming that the charge of a prior conviction for an assault to rob was insufficient, that offense being unknown in this state, this technical error in pleading will not work a reversal, if the punishment imposed does not exceed the limit which could properly be imposed upon conviction of the crime of robbery and the finding of a prior conviction of burglary.—State v. Paisley, 237.

Same—Prior Conviction of Burglary—Punishment—Statutory Construction.

27. Defendant was convicted of the crime of robbery, the penalty for which offense may be, under Penal Code, section 392, from one to twenty years' imprisonment. He was also found to have been previously convicted in a foreign state of burglary. The court imposed a sentence of fifty years in the state prison. Subdivision 1 of section 1232, Penal Code, provides that one, once convicted of a felony, who is thereafter again convicted of an offense which would be punishable upon a first conviction by imprisonment in the state prison for any term exceeding five years, is then punishable by such imprisonment for not less than ten years. *Held*, that the meaning of subdivision 1 above is, that if the maximum punishment for the offense for which defendant was on trial (robbery in this instance) is more, but not less, than five years' imprisonment, then his punishment could not be less than ten years, and might be extended to life imprisonment; and, hence, that the sentence of fifty years in this case was not unwarranted by law.—State v. Paisley 237.

Same—Prior Conviction—Information—Surplusage.

28. Since all that is required to be alleged in an information charging, among other things, a prior conviction, is, that defendant was convicted of a named offense, in a certain court on a given date, an allegation that defendant, having in March, 1902, been sentenced to a term of seven years, "did so serve said time" was surplusage; so that defendant's contention that the information charged an impossible state of facts, inasmuch as at the time of trial in March, 1906, only four years had elapsed, has no merit.—State v. Paisley, 237.

Same—Prior Conviction—Punishment—Instructions—Harmless Error.

29. Where defendant was charged with robbery and prior convictions, the giving of an instruction on the question of punishment, embracing all the subdivisions of section 1232, Penal Code, while only subdivision 1 should have been given, subdivision 2 and 3 having reference to offenses the punishment for which is five years or less, was improper, but rendered harmless by an instruction embodying the provisions of section 392, Penal Code, prescribing the maximum punishment for robbery at twenty years' imprisonment.—*State v. Paisley*, 237.

Same.

30. Nor was the giving of instructions defining burglary and prescribing its punishment prejudicial, in the above case, where defendant was also charged with having been previously convicted of burglary; while it would have been sufficient to have charged the jury that such latter offense was punishable by imprisonment in the state prison, the fact that the court was more elaborate in this respect than was necessary could not have harmed defendant, since what the court did say was correct.—*State v. Paisley*, 237.

Same—Instructions—Appeal—Record—Presumptions.

31. An instruction was given by the court in a prosecution for robbery, referring to "the last two instructions" on the subject of punishment which might be inflicted. Neither of these instructions, however, dealt with that subject. The jury, after retiring, returned into court and requested further instructions relative to the matter of punishment. Such instructions were given, but the record was silent as to their nature. The certificate of the clerk was to the effect that the record contained copies of all papers constituting the judgment-roll. *Held*, that, since it is incumbent upon appellant to point out the specific error upon which he relies, and since proper instructions on the subject of punishment were given, in the absence of anything to show which instructions were given in response to the request of the jury, the presumption in favor of the action of the trial court will be indulged.—*State v. Paisley*, 237.

Flight and Concealment—Instructions.

32. An instruction which substantially told the jury in a criminal action that if they were satisfied that the crime charged in the information had been committed by some one, they might then, in determining the defendant's guilt, take into consideration any testimony showing or tending to show flight or concealment on his part, was correct.—*State v. Paisley*, 237.

Alibi—Instructions—Burden of Proof.

33. Where the jury in a criminal cause had been properly instructed that the burden of proving, beyond a reasonable doubt, that defendant was present and participated in the alleged crime, a subsequent one stating simply that one of the defenses interposed by defendant was an *alibi* and defining that term, was not objectionable as impliedly casting the burden of proving that defense upon the defendant.—*State v. Paisley*, 237.

Evidence—Police Officers—Detectives—Credibility—Instructions.

34. An instruction, requested by defendant charged with crime, to the effect that, in weighing the testimony given by police officers and detectives, the jury should exercise greater care than in the case of other witnesses, because of the natural and unavoidable tendency and bias of such persons to construe everything as evidence against the accused and disregard all matters which did not tend to support their preconceived opinions of the case, was properly refused. If given, it would have invaded the province of the jury and been erroneous under any circumstances.—*State v. Paisley*, 237.

Information—Insufficiency—Habeas Corpus—Appeal.

35. If an information is not merely defective, but states facts which do not constitute any crime known to the law, or undertakes to state such an offense but the facts do not constitute it, and no addition to them, however full and complete, can supply what is essential, the court is without jurisdiction to put the defendant on trial, and, if convicted, he is entitled to his release on *habeas corpus*, even though he might secure the same relief on appeal.—In re Farrell, 254.

Forgery—Instrument Without Apparent Legal Validity.

36. To constitute forgery, the instrument alleged to have been forged must be one which, if genuine, would have legal validity; hence, if an instrument, though falsely made, shows upon its face that it has no legal validity, it cannot be made the basis of a charge of forgery.—In re Farrell, 254.

Forgery—Void Instrument—Seal—Habeas Corpus.

37. Complainant was convicted under an information charging that, while acting as deputy clerk of the district court, he forged a juror's certificate. The certificate did not bear the seal required by section 4645 of the Political Code. *Held*, on application for writ of *habeas corpus*, that section 4645 being mandatory and not directory merely, the certificate, in the absence of the seal, did not constitute a legal liability against the county, but was void on its face, that, therefore, a charge of forgery could not be predicated upon it, and that complainant was entitled to his release from custody.—In re Farrell, 254.

Appeal—Record—Clerk of District Court—Mandamus.

38. *Held*, on application for writ of mandate, that the clerk of the district court must, as soon as a notice of appeal in a criminal cause is filed with him, proceed to prepare a copy of the record and other papers enumerated in section 2281, Penal Code, and transmit same within ten days from the date of the notice, or, in case there be a bill of exceptions to be settled, then within ten days of the date of settlement, to the clerk of the supreme court without charge to appellant, and that a praecipe enumerating the papers constituting such technical record need not be lodged with the clerk.—State ex rel. Connors v. Foster, 278.

Appeal—Record—Rules of Supreme Court—Clerks of District Courts.

39. The copy of the record which the clerk of the district court is required, by section 2281, Penal Code, to prepare upon the filing of a notice of appeal in a criminal cause and transmit to the clerk of the supreme court, must meet the requirements of Rule VI, subdivision 2, and Rule VII of the appellate court, relative to the preparation and arrangement of transcripts on appeal.—State ex rel. Connors v. Foster, 278.

Record on Appeal—Clerks of District Courts—Compensation.

40. *Quaere*: Is the clerk of the district court entitled to compensation from his county for the performance of the duty imposed upon him by section 2281, Penal Code, and the rules of the supreme court, to furnish a copy of the record on appeal in a criminal cause in proper form?—State ex rel. Connors v. Foster, 278.

"Individual Bankers"—Receiving Deposits When Bank Insolvent—Void Statute—Habeas Corpus.

41. Complainant was convicted, under an information based upon section 986, Penal Code, for having received deposits as an "individual banker" when knowing that his bank was insolvent. The laws of this state make no provision for "individual" bankers, but do so for "private" bankers. Section 986, *supra*, appears to have been adopted from the state of New York after the courts of that state had construed the term "individual banker" to mean one other than a private

banker, and after such term had acquired the fixed and definite meaning, in the law, of one who was authorized to do banking subject to the supervision of the banking law. *Held*, that the term "individual banker" does not mean a "private" banker, that, since under the laws of this state there is no such person as an individual banker, complainant was convicted of an offense not known to the Penal Code, that the judgment of conviction was void and complainant entitled to his release from custody as prayed in his application for writ of *habeas corpus*.—In re Wisner, 298.

Penal Statutes—Construction—Doubt as to Meaning—How Resolved.

42. If, in construing a penal statute, the court should entertain a reasonable doubt as to its meaning, such doubt must be resolved in favor of the defendant attacking an information based upon the provisions of such statute.—In re Wisner, 298.

Same.

43. While the construction of penal statutes should not be so strict as to defeat the plain intent of the legislature, it must give the words employed the sense in which they were obviously used; and if then the legislative intent cannot be given effect, the law must fall.—In re Wisner, 298.

Forgery—Information—Duplicity—Surplusage.

44. An information which, after charging forgery of a promissory note, added that defendant, knowing that the instrument was false, uttered, passed and published the same as true and genuine with intent to defraud, etc., did not allege the commission of two offenses, to-wit, the false making of the note and the passing of it, since the latter portion, standing alone, did not state an offense. It was surplusage and should have been omitted.—State v. Mitten, 376.

Forgery—Passing of Instrument—Evidence—Information.

45. Evidence that the defendant, charged with forgery, passed the false instrument, is admissible upon the question of his criminal intent, without an allegation in the information to that effect.—State v. Mitten, 376.

Forgery—Evidence—Admissibility.

46. In a trial for forgery it was error to permit a witness, who testified to a transaction similar to that had by defendant with the persons whose names appeared on the note alleged to have been forged, to give the contents of a letter exhibited by accused to the witness, purporting to be a letter of recommendation from a state official. It was immaterial and should have been excluded.—State v. Mitten, 376.

Forgery—Falsely Making—Altering—Information—Instructions—Applicability to Issues.

47. Where defendant was charged with having forged a promissory note, not by altering it, but by falsely making the same, an instruction telling the jury, *inter alia*, that to constitute the crime of forgery it was sufficient if a genuine instrument "be altered so that it is not the instrument signed by the maker," etc., was erroneous, since in order to charge the offense by alteration, the information must clearly set forth the particulars in which the paper was altered.—State v. Mitten, 376.

Forgery by Alteration—Materiality.

48. To constitute forgery by altering an instrument, it is essential that such alteration be a material one.—State v. Mitten, 376.

Forgery—Proof.

49. One charged with forgery in fraudulently making an instrument cannot be proved guilty by showing that he altered the same.—State v. Mitten, 376.

Police Courts—Change of Venue—Justices' Courts.

50. *Obiter*: A police judge may, under Penal Code, section 2685, grant a change of the place of trial of a criminal cause pending before him, upon a motion, supported by a proper showing, either for bias or prejudice of such judge, or prejudice in the citizens of the township.—*In re Graye*, 394.

Justices of the Peace—Appeal—Record.

51. In the absence of specific statutory provision on the subject, the original files, together with a copy of the docket minutes, *held*, to constitute the record on appeal in a criminal cause, from a justice of the peace to the district court.—*In re Graye*, 394.

Homicide—Information—Sufficiency.

52. If a person of common understanding would, from the reading of an information, know that the defendant in a given case was charged with murder in the first degree, the defendant will be presumed to have had a like knowledge and be held not to have been prejudiced by the use of peculiar phraseology in it.—*State v. McGowan*, 422.

Information—Surplusage.

53. Superfluous words or sentences inserted in an information charging crime may be treated as surplusage and disregarded, if, without such words and sentences, it sufficiently charges the offense alleged to have been committed.—*State v. McGowan*, 422.

Homicide—Information—Sufficiency.

54. Allegations sufficient for a common-law indictment for murder suffice for an information under the Code.—*State v. McGowan*, 422.

Same—Information—Surplusage.

55. *Held*, that an information charging that defendant feloniously, willfully, deliberately, premeditatedly and of his malice aforethought made an assault with a gun, etc., loaded with gunpowder and leaden bullets, etc., "thereby, and by thus striking said deceased" etc., but which, while attempting to allege that the gun was discharged by the defendant at and upon deceased, failed of its purpose owing to faulty grammatical construction, was nevertheless sufficient, since the matter relating to the discharge of the gun was surplusage.—*State v. McGowan*, 422.

Same—Evidence—Admissibility—Harmless Error.

56. Where the defense interposed to a charge of murder was insanity, alleged error in the admission of certain shells, taken from the gun with which the crime was said to have been committed, claimed not to have been properly identified and not to be in the same condition as when taken from the gun, was harmless, in view of the offer of the court to defendant's counsel to examine the witness on the subject, which privilege was not taken advantage of, and where, on cross-examination of the witness, no further questions were asked him on the matter.—*State v. McGowan*, 422.

Same—Evidence—Alias.

57. Nor was the defendant in the above action prejudiced by a ruling of the court refusing permission to prove by certain witnesses that the deceased went by another name than that by which he was known at the time he was killed, where later such fact was brought to the attention of the jury by another witness.—*State v. McGowan*, 422.

Same—County Attorney—Misconduct.

58. The county attorney, in a prosecution for homicide, asked a witness whether he had a conversation with deceased a short time prior to the killing, in which deceased accused defendant of the crime of larceny. The court not only sustained an objection to the question,

but instructed the jury to disregard it. The county attorney thereafter did not persist in propounding incompetent questions. *Held*, that no prejudicial error resulted from putting the question.—*State v. McGowan*, 422.

Same Witnesses—Impeachment—Laying of Proper Foundation.

59. Where, in a homicide case, a witness for accused testified as to the conduct of decedent and the wife of the accused, while at the hotel of the witness, and the witness on cross-examination denied having told the county attorney that she knew nothing about the case, or about decedent and defendant's wife, except that they came there often for supper, but stated that she had told the county attorney that she knew nothing about the case that would help the state, and that, if she said that accused was jealous of decedent and that there was nothing wrong between decedent and accused's wife, she did not remember it, a proper foundation was laid for the admission of evidence that the witness made the statements that she denied making or denied having any remembrance of.—*State v. McGowan*, 422.

Same—Exclusion of Evidence—Offer of Proof.

60. Where, in a homicide case, an officer, testifying for the state, deposed that he was not friendly with decedent, an objection to a question, asked on cross-examination, whether the officer had had a warrant for the arrest of decedent which he had not served, was properly sustained, in the absence of an offer of proof showing feeling on the part of the witness, assuming that his feeling in the matter was a proper subject of inquiry.—*State v. McGowan*, 422.

Same—Domestic Relations—Evidence—Admissibility.

61. Where, in a homicide case, the issue was whether accused had been rendered insane by reason of deceased having been intimate with the wife of accused, it was competent to inquire into the intimacy and sacredness of the relations existing between accused and his wife, as bearing on the probability of defendant becoming crazed by the misconduct of decedent and the wife of accused.—*State v. McGowan*, 422.

Same—Language of Court—Harmless Error.

62. Prejudicial error did not result to one on trial for homicide, in which the defense was that accused had become insane by reason of decedent and accused's wife having maintained intimate relations, and where the evidence showed that accused and his wife maintained separate establishments, had divided a part of the property, and had arranged to divide the balance after a specified time, from the language of the court in designating the arrangement as a contract of separation. Though technically incorrect, it was not ground for reversal.—*State v. McGowan*, 422.

Same—Instructions—Definition of Murder.

63. Where the jury, in a capital case, had been instructed on the definition of murder, it was not necessary to again charge in a later instruction, which told them that if they found that accused had murdered decedent, and they did not find him guilty of murder in the first degree, they should find him guilty of murder in the second degree, that the word "murder" should be construed to mean the offense defined in the Penal Code, as set forth in preceding instructions.—*State v. McGowan*, 422.

Same—Instructions—Intent.

64. Defendant was not prejudiced by the giving of an instruction on the question of criminal intent, which, among other things, stated that they should determine whether at the time of the killing defendant had the mental capacity to entertain a criminal act, the court

inadvertently substituting the word "act" for "intent," where, in other instructions, the jury had been repeatedly referred to the distinction between the intent of the defendant and the mere act of killing, and told that in every crime there must exist a union or joint operation of act and intent.—*State v. McGowan*, 422.

Same—Instructions—Use of Word "Crime."

65. The use of the word "crime" in an instruction in several instances, among others in the statement that if the jury believed beyond a reasonable doubt that defendant committed "the crime of which he is accused," was not error as indicating that the court had formed the opinion that the necessary elements of the offense had been proven against the defendant, since the jury must have understood that the words "of which he is accused" qualified the term "crime" wherever used in the instruction.—*State v. McGowan*, 422.

Same—Instructions—Insanity.

66. The statement in an instruction, given in a trial for homicide, on the subject of insanity, that if defendant was mentally capable of choosing either to do or not to do the act constituting the crime of which he was charged, and of governing his conduct in accordance with such choice, a verdict of guilty should be rendered, even though the jury believed that at the time of the commission of the crime he was not entirely and perfectly sane, was correct.—*State v. McGowan*, 422.

Same—Instructions—Manslaughter.

67. Where the evidence in a trial for homicide showed that defendant was either guilty of deliberate murder or not guilty by reason of insanity, which was the only defense interposed, the failure of the court of its own motion to give an instruction on the crime of manslaughter was not error.—*State v. McGowan*, 422.

Arraignment—Irregularities—Waiver.

68. The minutes of the trial of a criminal cause failed to show that the copy of the information delivered to defendant contained the names of the witnesses for the state. They did show that he asked for and obtained time to plead and afterward, without objection, pleaded to the information. *Held*, that by pleading without objection he waived the defect in the arraignment.—*State v. De Lea*, 531.

Verdict—Jury—Calling of Names.

69. The purpose of section 2142, Penal Code, providing that the names of the jurors must be called by the clerk when their verdict is delivered, is to insure their presence before the verdict is delivered.—*State v. De Lea*, 531.

Same—Irregularities—Harmless Error.

70. Where the record in a criminal cause did not show that the jurors were not all present when the verdict was delivered, and from the minutes no other fair inference could be drawn than that they were actually present at the time, the omission from the minutes of a statement that their names were called prior to delivery of the verdict was not an error which prejudiced defendant in his substantial rights, and the irregularity may be disregarded under the provisions of sections 2320 and 2600 of the Penal Code.—*State v. De Lea*, 531.

Same—Presence of Defendant—Minutes.

71. While under section 2142, Penal Code, the fact that the defendant in a criminal cause was present when the verdict was received must affirmatively appear, minutes which show his presence during the trial up to the time the jury retired, and then recite that "defendant

thereupon waived the polling of the jury" and "defendant *thereupon* waives time for sentence and elects to be sentenced at this time," sufficiently meet this requirement.—State v. De Lea, 531.

Reasonable Doubt—Instructions.

72. An instruction defining the term "reasonable doubt" in the language employed for that purpose in Territory v. McAndrews, 3 Mont., at page 162, and there approved and since accepted as a proper definition of those words, is not open to the objection that by it the jury were confined to a consideration of the evidence, whereas a reasonable doubt might arise from the lack of evidence.—State v. De Lea, 531.

Instructions—Credibility of Defendant.

73. While it is the general rule that a court ought not in its instructions single out a particular witness and direct the attention of the jury to his testimony, section 2442, Penal Code, makes an exception to this rule, and the court may properly instruct that the jury, in judging the credibility of one on trial for a crime and the weight to be given to his testimony, may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he stands charged.—State v. De Lea, 531.

Larceny—Definition—Curing Error.

74. The defect in an instruction which incorrectly defined "larceny" was cured by a subsequent one, which, though not technically correct, was not open to the objection urged against it by appellant.—State v. De Lea, 531.

CROSS-EXAMINATION.

See Evidence, 17.

CUSTOM.

Evidence—Custom of Miners.

1. In an action for injuries to a miner by a timber falling while being hoisted through an alleged defective chute by means of a faulty rope, evidence that, where a signal is given to hoist a timber through a raise, it is the general custom among miners for the man giving the signal to stand clear, was admissible.—Leary v. Anaconda C. Min. Co., 157.

DAMAGES.

Personal Injuries—Jury—Abuse of Discretion.

1. In personal injury cases, the amount to be awarded is left to the fair discretion of the jury, under the facts of the particular case, and damages so awarded, even if comparatively large, will not be held determinative of an abuse of such discretion, unless so disproportionate to the injury complained of as to shock the moral sense.—Lewis v. Northern Pac. Ry. Co., 207.

Same—Excessive—When not Ground for New Trial.

2. Where an amount awarded by the jury for personal injuries, claimed by defendant to have been so excessive as to amount to an abuse of the discretion lodged in it, may have been the result of a miscalculation, or based upon a wrong standard, the award cannot be said to have been the result of passion or prejudice so as to entitle the defendant to a new trial under subsection 5 of section 1171 of the Code of Civil Procedure.—Lewis v. Northern Pac. Ry. Co., 207.

Same—Excessive—New Trial—Remission of Excess.

3. *Held*, that the district court, in an action for damages for personal injuries alleged to have been suffered by plaintiff, a brakeman on a railroad, through the loss of his left hand, was justified in grant-

ing a new trial conditioned upon the remission of \$7,400 from a verdict for \$17,400, and in thereafter, with plaintiff's consent, scaling it to \$10,000, and that such latter amount was not excessive in view of all the circumstances in the case.—*Lewis v. Northern Pac. Ry. Co.*, 207.

Same—Impairment of Earning Capacity.

4. In arriving at a verdict in a personal injury case, the jury, in addition to the mental and physical pain suffered in plaintiff, and the disfigurement of his person, should also take into consideration, where earning capacity depends upon physical strength, the fact that his physical condition becomes impaired by advancing age, and that, as a consequence, his earning capacity is diminished thereby.—*Lewis v. Northern Pac. Ry. Co.*, 207.

False Imprisonment—Excessive.

5. Where, in an action for false imprisonment, the evidence showed that plaintiff was detained in defendant's office for about three-quarters of an hour in an effort on defendant's part to obtain from her a deed handed to her for inspection, and which she refused to return, and that the result of such detention was sickness, nervousness, humiliation and disgrace to plaintiff, a verdict for \$250, held, not to be excessive.—*Kroeger v. Passmore*, 504.

DEATH.

Negligent killing,—see *Railroads*, 2-15.

DECLARATIONS.

See *Evidence*, 8.

DEEDS.

See *Equity*, 2-4; *Mines and Mining*, 1-4.

DEFAULT.

Application to Set Aside—Requisites.

1. A party defendant, on application to set aside his default, must, in addition to excusing his delinquency, support the motion by an affidavit of merits setting forth the facts constituting his defense, or tender with the motion and affidavit a copy of his proposed answer.—*Schaefer v. Gold Cord Min. Co.*, 410.

Affidavit of Merits—Insufficiency.

2. An affidavit, filed in support of an application to open a default, which recited that the president of the defendant corporation "fully and fairly stated the case" to affiant, defendant's attorney, and that affiant "says that said defendant has a good and meritorious defense," was not a statement of facts from which the district court could determine that the defendant had, *prima facie*, a defense upon the merits, and a denial of the application was proper.—*Schaefer v. Gold Cord Min. Co.*, 410.

Setting Aside—Demurrer.

3. Courts will not open a default to allow the interposition of a demurrer.—*Schaefer v. Gold Cord Min. Co.*, 410.

DEFENSES.

See *False Imprisonment*, 6, 8, 9.

DEFICIENCY JUDGMENT.

See Execution, 1.

DEMAND.

See Pleadings, 1, 2.

DEMURRER.

Complaint—Sufficiency.

1. If, under the facts stated in a complaint, the plaintiff is entitled to the relief demanded, or *any* relief, it is proof against a general demurrer.—Donovan v. McDevitt, 61.

When It Will not Lie.

2. Where it appeared from the face of a complaint that defendant was indebted to plaintiff in a certain amount for money had and received, the pleading was proof against a general demurrer, and the fact that plaintiff demanded equitable relief by way of an accounting was immaterial.—Donovan v. McDevitt, 61.

When Improper—Complaint—Prayer.

3. While section 671 of the Code of Civil Procedure makes the prayer a part of the complaint, it is made such part independently of the statement of facts constituting the cause of action, and if the facts stated in the body of the complaint entitle plaintiff to any relief, it is error to sustain a general demurrer, no matter what may be the form of the prayer, or whether there be any prayer at all.—Donovan v. McDevitt, 61.

Same.

4. Informality of the prayer in a complaint, or the total absence of one, not being one of the defects named in section 680 of the Code of Civil Procedure for which a demurrer will lie to the complaint, a demurrer for that reason should not be sustained, notwithstanding the provision of section 1003 of the same code, that the relief granted to plaintiff, if there be no answer, cannot exceed that demanded in his complaint.—Donovan v. McDevitt, 61.

Mechanics' Liens—Joinder of Causes—On Contract—*Quantum Meruit*.

5. Where plaintiff in a suit to foreclose a mechanic's lien joined a count on an express contract for the construction of a cistern, with a count on a *quantum meruit*, the averments of each not having been so inconsistent as to be contradictory, and where the defendant was not misled to his prejudice, a demurrer on the ground of ambiguity and uncertainty was properly overruled.—Neuman v. Grant, 77.

Justices of the Peace—Interpleader—Appeal.

6. In an action by an assignee on an account, the justice of the peace sustained the demurrer of one of the defendants on the ground that the complaint, as against him, asked for equitable relief and thus, virtually, dismissed him from the case. This defendant was subsequently interpleaded by the original defendant, who paid the amount in controversy into court and asked that plaintiff and the substituted defendant be required to submit their claims to the money for determination. When the order of substitution was made, no objection was made by the interpleaded defendant that the complaint did not tender an issue upon the question of right between him and plaintiff. The defendant had judgment and plaintiff appealed to the district court. Here the defendant again interposed the demurrer which had been sustained by the justice of the peace. This was overruled. *Held*, that the action of the district court in overruling the demurrer was correct.—Anderson v. Red Metal Min. Co., 312.

Default—Setting Aside.

7. Courts will not open a default to allow the interposition of a demurrer.—*Schaefer v. Gold Cord Min. Co.*, 410.

Pleading—Uncertainty.

8. If a defendant in a civil action desires a complaint to be made more definite and certain, he should file a special demurrer for that purpose in the trial court.—*Carlson v. Barker*, 486.

DEPOSITS IN COURT.

See *Eminent Domain*, 1-4.

DESCRIPTIONS.

See *Mines and Mining*, 3; *Mortgages*, 1.

DETECTIVES.

Credibility,—see *Criminal Law*, 34.

DISCRETION.

See, also, *Nonsuit*, 6.

New Trial—Conflicting Evidence.

1. Where the evidence is conflicting, a motion for a new trial upon the ground of the insufficiency of the evidence to sustain the verdict is addressed to the sound legal discretion of the trial court.—*Stephens v. Elliott*, 92.

Personal Injuries—Physicians—Demonstrative Evidence.

2. It lay within the discretion of the district court to permit a physician, while testifying in a personal injury suit, to make use of the injured arm of plaintiff in an endeavor to explain his testimony to the jury, and, nothing appearing that such discretion had been abused, its action will not be disturbed on appeal.—*Stephens v. Elliott*, 92.

Same—Jury—Viewing Premises.

3. Where, in a personal injury suit, drawings of the machinery, the faulty condition of which plaintiff alleged as the cause of his injury, had been presented to the jury for inspection, and, upon inquiry by the court, the jurors all stated that they understood the situation, the court acted within its discretion when it refused to direct a view of the machinery itself, at a mine a considerable distance from the place of trial.—*Stephens v. Elliott*, 92.

Criminal Law—Precautionary Instruction.

4. In a prosecution for crime it is discretionary with the trial court to give, or refuse, an instruction cautioning the jury as to the duty of each member thereof not to vote for a verdict of guilty if he entertain a reasonable doubt, merely because a majority should be in favor of such a verdict, and not to yield his conscientious convictions as to the guilt or innocence of the accused to the will of the majority for the sake of humanity or to prevent a mistrial.—*State v. Phillips*, 112.

Officers—Ministerial Duties—Statutes.

5. Where the mode of performance of ministerial duties, expressly enjoined, is prescribed, no further power is implied, and the officer has no discretionary power with reference thereto, but must strictly pursue the statute.—*In re Farrell*, 254.

Fraternal Insurance—Delinquency—Reinstatement.

6. If, in passing upon an application for reinstatement to membership in a fraternal society, the officer of the grand body to whom proof of the applicant's good health must be submitted, in the exercise of the discretion lodged in him decides adversely to the applicant, the latter cannot complain.—*Kennedy v. The Grand Fraternity*, 325.

Same—Delinquency—Reinstatement—Evidence of Good Health.

7. The officer in whom was lodged the authority to pass upon applications for reinstatement of delinquents to membership in a fraternal insurance order, may not be said to have abused the discretion vested in him by the constitution and by-laws of the society, in rejecting an applicant who, according to the evidence, had, about two months prior to his application for reinstatement, been confined to his bed by pneumonia for three weeks, a disease shown to be often accompanied by serious lung troubles.—*Kennedy v. The Grand Fraternity*, 325.

Motion to Set Aside Judgment—Mistake, etc.—Review.

8. A motion to set aside a judgment on the ground of mistake, surprise or excusable neglect, being addressed to the discretion of the court, an order refusing such a motion will not be reversed on appeal where no complaint is made that such discretion had been abused in passing upon the affidavits filed in support of the motion and those against it, and where no reference is made in appellant's brief to them, the errors relied on being such as were not reviewable on an appeal from an order of this kind.—*Ferguson v. Parrott*, 352.

New Trial—Findings—Evidence—Insufficiency.

9. A motion for a new trial, on the ground that the findings are not supported by the evidence, is addressed to the sound legal discretion of the trial court, and its order will not be disturbed, except in a case of manifest abuse of such discretion.—*White v. Barling*, 413.

Specific Performance—Equity Cases—Appeal.

10. In an action for specific performance of a contract, if plaintiff is not entitled to relief as of right, then upon a motion for nonsuit at the close of plaintiff's testimony it is the trial court's duty to adjudicate the issues between the parties, and the court may exercise a legal discretion in giving or withholding relief; hence the effect of nonsuit would not be to determine that plaintiff was not entitled to relief in any view of the evidence, but that the court, in the exercise of its discretion, withheld relief in that particular case, and its action will not be disturbed on appeal unless there was an abuse of discretion.—*Stevens v. Trafton*, 520.

DISTRICT COURTS.

See, also, Discretion.

Powers in Divorce Proceedings.

1. The power to decree a divorce is purely statutory, and therefore courts have not any inherent power to dissolve marriage.—*Rumping v. Rumping*, 39.

Divorce—Residence of Plaintiff—Duty of Courts.

2. In divorce proceedings district courts should, under the mandate of section 176 of the Civil Code, providing that a divorce *must not* be granted unless plaintiff has been a resident of the state for one year next preceding the commencement of the action, *ex officio* inquire into the fact of plaintiff's residence—jurisdictional in its nature—and be governed accordingly.—*Rumping v. Rumping*, 39.

DITCHES.

See Waters and Water Rights.

DIVORCE.

Power of District Courts.

1. The power to decree a divorce is purely statutory, and therefore courts have not any inherent power to dissolve marriage.—Rumping v. Rumping, 39.

Residence of Plaintiff—Complaint—Jurisdiction.

2. The fact that plaintiff in a suit for divorce has been a resident of the state for the statutory period of one year next preceding the commencement of the suit (Civ. Code, sec. 176) must be alleged in the complaint in order to confer jurisdiction of the cause upon the trial court.—Rumping v. Rumping, 39.

Divorce—Residence of Plaintiff—Complaint—Duty of District Courts.

3. In divorce proceedings district courts should, under the mandate of section 176 of the Civil Code, providing that a divorce *must not* be granted unless plaintiff has been a resident of the state for one year next preceding the commencement of the action, *ex officio* inquire into the fact of plaintiff's residence—jurisdictional in its nature—and be governed accordingly.—Rumping v. Rumping, 39.

DOMESTIC ANIMALS.

See Mortgages.

DOMESTIC RELATIONS.

See Evidence, 25.

DOWER.

Judgment Against Husband—Effect.

1. The lien of a judgment against a husband is subject to the interest of his wife, whether arising from a tenancy in common with her husband or out of her right of dower.—Manuel v. Turner, 512.

DUEBILLS.

See Assignment.

EJECTMENT.

Evidence—Admissibility.

1. The complaint in an action in ejectment alleged ownership and right of possession, that on a certain date defendant, without plaintiff's consent, took possession of the premises, and had ever since detained the same, and that the value of the rents was \$30 a month. The answer admitted that plaintiff was the owner, but denied his right of possession, and also that defendant entered without plaintiff's consent, and the allegation as to the value of the rents. *Held*, that it was error to exclude testimony offered by defendant that she was placed in possession by plaintiff's agent under a contract of sale made with the agent. It bore upon the question of plaintiff's right to recover damages from the defendant for the use of the property, and should have been admitted.—O'Toole v. Copeland, 344.

ELECTIONS.

County Free High Schools—Proclamation—Notice.

1. Section 3 of the Act of 1907, making provision for the establishment of county free high schools (Laws 1907, Chapter 29, p. 50), declares that the special election therein mentioned "shall be conducted in accordance with the general election laws of the state." It provides for a notice of election, but makes no mention of an election proclamation. *Held*, that the general election laws are applicable to such special election, except in so far as superseded by the special provisions of the Act, and that the notice of election does not take the place of the election proclamation, made necessary by the reference to the general election laws.—*Evers v. Hudson*, 135.

Statutory Requirements—Duty of Officers.

2. Officers charged by statute with giving a certain notice relative to a special election must at least substantially comply with such requirement—even assuming it be directory only—and cannot wholly disregard it or substitute something entirely different in lieu thereof.—*Evers v. Hudson*, 135.

County Free High Schools—Proclamation—Notice—Taxes—Invalidity.

3. Where the defendant county treasurer, in an action to enjoin the collection of a tax imposed for the purpose of establishing a county free high school pursuant to Act of 1907 (Laws 1907, Chapter 29, p. 50), interposed a demurrer, and thus admitted an allegation in the complaint that because of the failure of the board of county commissioners to proclaim the holding of a special election provided for in the Act, and of the clerk to give proper notice, a large number of qualified electors were prevented from voting, the voters had not been given that opportunity to freely and fairly give expression to their wishes, as contemplated by the election laws, and therefore the election was invalid, and the tax, levied in pursuance thereof, void.—*Evers v. Hudson*, 135.

ELECTRICITY.

See Personal Injuries, 43-50.

EMINENT DOMAIN.

Deposit in Court—Payment to Trustee.

1. In answer to a petition by a trustee holding the legal title to land which had been condemned for railroad purposes, for an order that the money deposited in court for the land be paid to him, one of the beneficiaries under the trust alleged that petitioner had mismanaged the affairs of the trust, that an action was then pending for his removal, and asked that payment to him be withheld. The order asked for by the trustee was made. *Held*, that the court's action was correct, since the petitioner, as holder of the legal title, was *prima facie* entitled to the fund, a fact in effect admitted in the pleading of the objecting beneficiary.—*Chicago etc. Ry. Co. v. White*, 437.

Nonappealable Orders.

2. An order authorizing the payment of a fund deposited in court in condemnation proceedings to the person entitled thereto is not a special order after final judgment from which an appeal may be taken.—*Chicago etc. Ry. Co. v. White*, 437.

Same.

3. Nor is the above order one directing the delivery, transfer or surrender of property, within the meaning of section 1722 of the Code of

Civil Procedure as amended (Laws 1899, p. 146), authorizing an appeal.—Chicago etc. Ry. Co. v. White, 437.

Deposit in Court—Persons Entitled.

4. It is only where no dispute arises as to who is entitled to a fund deposited in court in condemnation proceedings that the court can entertain a motion to direct the clerk to pay it over.—Chicago etc. Ry. Co. v. White, 437.

EQUITY.

See, also, Accounting, 1, 2; Interpleader, 1; Justices of the Peace, 6; Specific Performance.

Motion for Judgment—Inferences Drawn from Evidence—Findings—Review.

1. Plaintiff, upon motion by defendant for judgment, made at the close of plaintiff's case in an equity suit, is not entitled—as he would be on a motion for nonsuit in an action at law—to have every inference drawn in his favor from the evidence which may reasonably be drawn therefrom; but the whole of the evidence is submitted to the court for final judgment, and if it furnishes ground for different inferences, the finding of the court thereon will not be disturbed unless the evidence preponderates against it.—Streicher v. Murray, 45.

Deeds—Cancellation—Fraud—Laches.

2. Plaintiffs, in a suit to set aside a deed to mining property on the ground of fraud, were subjects of the German empire and resided there. In 1892 they executed and delivered, through a duly authorized agent, a deed to the property in question. In 1894 they were informed that fraud had been practiced in the transaction, and commenced suit in 1897, which, however, was not brought to trial until 1906, plaintiffs' only excuse for the delay being that, as residents of a foreign country and ignorant of the English language and the institutions of this country, it was difficult for them to obtain the necessary facts to support their action. The testimony of the principal witnesses, with the exception of one whose testimony could, however, have been readily supplied by others, was obtainable at any time. *Held*, that plaintiffs' right to relief was barred by laches in prosecuting their suit.—Streicher v. Murray, 45.

Laches in Prosecuting Action.

3. One desiring to rescind a contract on the ground of fraud is not relieved of the imputation of laches by the mere bringing of his action promptly, if thereafter he neglects to prosecute it with diligence.—Streicher v. Murray, 45.

Laches—Striking Competent Testimony—When Harmless.

4. Where the district court correctly found that plaintiffs' cause of action in a suit for the cancellation of a deed to mining property, on the ground of fraud, was barred by laches, alleged error in striking out competent and material testimony which tended to support a charge of conspiracy to defraud, will not be considered.—Streicher v. Murray, 45.

Appeal—Equity Cases—Scope of Review.

5. (On Motion for Rehearing.) While in equity cases the supreme court, under amended section 21, Code of Civil Procedure (Laws 1903, Second Extra. Session, p. 7), is required "to review all questions of fact arising upon the evidence presented in the record * * * and determine the same," the review may go no further than to determine whether there is a decided preponderance in the evidence against the findings of

the trial court, and it will not undertake to try a cause and determine it as does the district court.—*Pope v. Alexander*, 45.

Appeal—Disposition of Causes.

6. The supreme court must, under Act of 1903 (Laws 1903, 2d Extra. Session, p. 7), on appeal in equity cases review all questions of fact arising upon the evidence presented, and determine the same, unless for good cause shown a new trial or the taking of further evidence be ordered. In a cause of an equitable nature it was held on appeal that the defendant had not made out a case upon which he was entitled to recover, and that therefore the trial court should have found in plaintiff's favor. The cause was remanded "to be proceed with in accordance with the suggestions" made in the opinion. *Held*, that the district court thereafter properly entered judgment for plaintiff, a new trial or the taking of further evidence not having been ordered.—*Kennedy v. Dickie*, 196.

Equity Cases—Disposition of, on Appeal.

7. Where the supreme court, on appeal in an equity case, reverses the judgment, but no cause appears why a new trial or the taking of further testimony should be ordered, it will, under the provisions of the Act of 1903 (Laws 1903, Second Extra. Session, p. 7), enter a judgment finally determining the cause.—*North Real Estate L. & T. Co. v. Billings L. & T. Co.*, 356.

Purchaser for Value—When Defense Available.

8. *Obiter*: The defense of purchase for value and without notice may be interposed only as against the holder of an equitable title.—*Eisenhauer v. Quinn*, 368.

New Trial—Findings—Modification.

9. A litigant, in an equity case, has the right to move for the modification of a finding, or ask for a new trial; hence, a trial court cannot dictate to the moving party to pursue the former method, so as to save the trouble and expense of a retrial.—*White v. Barling*, 413.

Decrees—Are Judgments.

10. Decrees in equity are judgments within the definition of section 1000, Code of Civil Procedure, and are, so far as they award a recovery of money, in nowise different from judgments at law.—*Raymond v. Blancgrass*, 449.

Decrees—Liens.

11. When properly docketed, a decree in equity becomes a lien upon the real estate of the debtor.—*Raymond v. Blancgrass*, 449.

Decrees—How Enforced.

12. A decree in equity directing the payment of money may be enforced by execution in the same manner as a judgment in an action at law.—*Raymond v. Blancgrass*, 449.

Husband and Wife—Separate Maintenance—Decree—Enforcement.

13. Where a wife recovers a judgment against her husband for separate maintenance, she becomes his creditor for the amount adjudged due at the time, and for amounts accruing from month to month, occupies toward him the position of any other creditor, is entitled to the same relief in equity, if she seeks the satisfaction of her claim, and may maintain an action at law upon any ground available to any other creditor.—*Raymond v. Blancgrass*, 449.

Foreclosure—Complaint—Adjustment of Equities.

14. Where the complaint in a mortgage foreclosure suit stated that defendants other than the mortgagors had or claimed interests in or liens on the premises, as judgment or attaching creditors, but that their

interests or liens were subordinate to plaintiff's mortgage, and demanded that the priority of the mortgage lien be fixed and established, and that the liens of such other defendants be declared inferior to it, the court properly adjusted these equities in the decree.—*Manuel v. Turner*, 512.

Equity Cases—"Nonsuit."

15. In equitable proceedings there can be, strictly speaking, no such thing as a motion for a nonsuit.—*Stevens v. Trafton*, 520.

Appeal—Final Disposition—Practice.

16. Since the evident purpose of the Act of 1903 (Laws 1903, 2d Extra. Session, p. 7), requiring the supreme court to determine all questions of fact as well as of law in equity cases, unless for good cause a new trial or the taking of further testimony be ordered, is to expedite the entry of final judgment in such cases, and thus put an end to litigation, it is the duty of the parties to introduce all their testimony in the trial court, in order to enable the appellate tribunal to carry out the intention of the Act.—*Stevens v. Trafton*, 520.

Same.

17. On appeal in equity cases, defendant's motion for judgment at the conclusion of plaintiff's case will be construed as a declaration that, in case his motion is granted, he elects to stand upon the case made by plaintiff, and final judgment on appeal will be entered accordingly, and new trials in such cases will not be ordered except for good cause shown in the record.—*Stevens v. Trafton*, 520.

ESTATES.

See Witnesses, 1.

ESTOPPEL.

See, also, Insurance, 10.

Pleadings.

1. To be available as a defense, estoppel must be pleaded.—*Eisenhauer v. Quinn*, 368.

EVIDENCE.

Prescription—Findings—Harmless Error.

1. The correctness of a finding of adverse use of a portion of a city lot for a sufficient length of time to establish a street by prescription is not affected by an alleged error of the court in making a finding upon the subject of dedication based on incompetent evidence.—*Pope v. Alexander*, 82.

Admissibility—Personal Injuries—Master and Servant.

2. Where plaintiff's complaint, in an action to recover damages from his employer for personal injuries, alleged that he was injured while "pursuing his occupation of running a whim" at a mine, evidence that he had been actually employed for a different purpose, to-wit, as a teamster, but had been subsequently put to work running the whim against his protests, was admissible.—*Stephens v. Elliott*, 92.

Leading Questions—Appeal.

3. Where the answer to a question was not at all responsive, and a motion to strike it was not made, error assigned on the overruling of an objection to the question as leading, will not be considered on appeal.—*Stephens v. Elliott*, 92.

Personal Injuries—Physicians—Demonstrative Evidence—Discretion.

4. It lay within the discretion of the district court to permit a physician, while testifying in a personal injury suit, to make use of the injured arm of plaintiff in an endeavor to explain his testimony to the jury, and, nothing appearing that such discretion had been abused, its action will not be disturbed on appeal.—*Stephens v. Elliott*, 92.

Same—Evidence to Anticipate Defense—Order of Proof.

5. Error cannot be predicated upon the action of the court, in the cause set forth in the foregoing paragraph, in permitting plaintiff to introduce in his case in chief the testimony of a physician to the effect that plaintiff could not simulate the condition which the witness had found upon examination of the injured limb, or its consequences, where the objection was not that the proper order of proof—a matter largely in the discretion of the trial court—was not being followed, but that the testimony was incompetent and irrelevant.—*Stephens v. Elliott*, 92.

Same—Competency and Materiality.

6. Nor was the testimony, above referred to, incompetent and irrelevant, in view of the defendant's testimony tending to contradict plaintiff's contention that since the injury he had not been able to grasp anything with the hand of his injured arm.—*Stephens v. Elliott*, 92.

Same—Physicians—Demonstrative Evidence—Discretion.

7. It was not error for the court to permit a physician, who had testified that the motor nerves of plaintiff's hand were entirely destroyed by the injury, and that, in sympathy with this condition, the sensory nerves, which control the feeling in the hand, had become so far paralyzed that no feeling remained in the hand, to demonstrate this before the jury by thrusting a hypodermic needle into the back of plaintiff's hand.—*Stephens v. Elliott*, 92.

Quieting Title—Uncertainty in Description—Declarations.

8. In a suit by an administrator to recover real property, claimed by defendants under deeds of grant from plaintiff's intestate, for alleged uncertainty of description, declarations of defendant's grantor relative to the title conveyed and the location of the portions transferred, were admissible against the administrator.—*Collins v. McKay*, 123.

Real Property—Lost Monuments—Parol Evidence.

9. Where monuments or marks called for in a deed are lost or otherwise uncertain, their location may be proved by parol evidence.—*Collins v. McKay*, 123.

Custom of Miners.

10. In an action for injuries to a miner by a timber falling while being hoisted through an alleged defective chute by means of a faulty rope, evidence that, where a signal is given to hoist a timber through a raise, it is the general custom among miners for the man giving the signal to stand clear, was admissible.—*Leary v. Anaconda C. Min. Co.*, 157.

Exclusion—Correct Ruling—Wrong Reason.

11. Where the ruling of the district court in the exclusion of evidence in an action in conversion was correct, the fact that it stated a wrong reason therefor was immaterial.—*Massachusetts Sheep Co. v. Humble*, 201.

Criminal Law—Insufficiency—Duty of Court.

12. Where, in a criminal cause, there is no substantial evidence to support a verdict of guilty, it becomes the duty of the district court, as a matter of law, to vacate and set it aside, and refusal so to do is reversible error.—*State v. McCarthy*, 226.

Grand Larceny—Insufficiency—Review.

13. Evidence examined and held insufficient to sustain a conviction of the crime of grand larceny.—*State v. McCarthy*, 226.

Criminal Law—Evidence Necessary to Convict.

14. Mere suspicions or probabilities, however strong, are insufficient to convict of crime. There must be some substantive testimony to justify a judgment of conviction.—*State v. McCarthy*, 226.

Same—Grand Larceny—Accomplices.

15. The testimony of a woman, an alleged accomplice of defendant charged with grand larceny, relative to an understanding she had with him that, when present in a winerom adjacent to defendant's saloon, she was to induce men to drink excessively so as to more readily be able to get hold of their money, was competent as tending to show a system or plan uniformly pursued, and thus to show guilty knowledge or criminal intent.—*State v. McCarthy*, 226.

Same—Accomplices—Corroboration.

16. Under Penal Code, section 2089, the testimony of an accomplice is insufficient to support a conviction, unless corroborated by other evidence which, in itself and independently of that of the accomplice, tends to connect the accused with the crime alleged to have been committed.—*State v. McCarthy*, 226.

Same—Grand Larceny—Cross-examination.

17. In a prosecution for grand larceny where the prosecuting witness claimed to have been deprived of his property while in the winerom adjoining defendant's saloon with an alleged female accomplice of defendant, it was error to refuse permission to defendant's counsel, on cross-examination of the woman, to interrogate her as to whether the complaining witness had an act of sexual intercourse with her on the floor of the room. The offered testimony was competent as showing what opportunity the woman had to take the money without the aid or knowledge of the defendant.—*State v. McCarthy*, 226.

Admissibility—Ejectment.

18. The complaint in an action in ejectment alleged ownership and right of possession, that on a certain date defendant, without plaintiff's consent, took possession of the premises, and had ever since detained the same, and that the value of the rents was \$30 a month. The answer admitted that plaintiff was the owner, but denied his right of possession, and also that defendant entered without plaintiff's consent, and the allegation as to the value of the rents. *Held*, that it was error to exclude testimony offered by defendant that she was placed in possession by plaintiff's agent under a contract of sale made with the agent. It bore upon the question of plaintiff's right to recover damages from the defendant for the use of the property, and should have been admitted.—*O'Toole v. Copeland*, 344.

Forgery—Passing of Instrument.

19. Evidence that the defendant, charged with forgery, passed the false instrument, is admissible upon the question of his criminal intent, without an allegation in the information to that effect.—*State v. Mitten*, 376.

Forgery—Admissibility.

20. In a trial for forgery it was error to permit a witness, who testified to a transaction similar to that had by defendant with the persons whose names appeared on the note alleged to have been forged, to give the contents of a letter exhibited by accused to the witness, purporting to be a letter of recommendation from a state of-

ficial. It was immaterial and should have been excluded.—*State v. Mitten*, 376.

Homicide—Admissibility—Harmless Error.

21. Where the defense interposed to a charge of murder was insanity, alleged error in the admission of certain shells, taken from the gun with which the crime was said to have been committed, claimed not to have been properly identified and not to be in the same condition as when taken from the gun, was harmless, in view of the offer of the court to defendant's counsel to examine the witness on the subject, which privilege was not taken advantage of, and where, on cross-examination of the witness, no further questions were asked him on the matter.—*State v. McGowan*, 422.

Same—Alias.

22. Nor was the defendant in the above action prejudiced by a ruling of the court refusing permission to prove by certain witnesses that the deceased went by another name than that by which he was known at the time he was killed, where later such fact was brought to the attention of the jury by another witness.—*State v. McGowan*, 422.

Same—Witnesses—Impeachment—Laying of Proper Foundation.

23. Where, in a homicide case, a witness for accused testified as to the conduct of decedent and the wife of the accused, while at the hotel of the witness, and the witness on cross-examination denied having told the county attorney that she knew nothing about the case, or about decedent and defendant's wife, except that they came there often for supper, but stated that she had told the county attorney that she knew nothing about the case that would help the state, and that, if she said that accused was jealous of decedent and that there was nothing wrong between decedent and accused's wife, she did not remember it, a proper foundation was laid for the admission of evidence that the witness made the statements that she denied making or denied having any remembrance of.—*State v. McGowan*, 422.

Same—Exclusion—Offer of Proof.

24. Where, in a homicide case, an officer, testifying for the state, deposed that he was not friendly with decedent, an objection to a question, asked on cross-examination, whether the officer had had a warrant for the arrest of decedent which he had not served, was properly sustained, in the absence of an offer of proof showing feeling on the part of the witness, assuming that his feeling in the matter was a proper subject of inquiry.—*State v. McGowan*, 422.

Same—Domestic Relations—Admissibility.

25. Where, in a homicide case, the issue was whether accused had been rendered insane by reason of deceased having been intimate with the wife of accused, it was competent to inquire into the intimacy and sacredness of the relations existing between accused and his wife, as bearing on the probability of defendant becoming crazed by the misconduct of decedent and the wife of accused.—*State v. McGowan*, 422.

Cities and Towns—Personal Injuries—Admissibility.

26. The daughter of plaintiff in an action against a city for damages for personal injuries told a girl friend where her mother fell. The friend, as a witness in the cause, deposed to the fact that she fell at the same place, identifying it. There was also testimony that no broken boards other than the one alleged to have been the cause of the injury existed in the sidewalk in the immediate vicinity. *Held*, that the admission in evidence of the daughter's statement that she told her friend where her mother claimed to have been hurt was not prejudicial error.—*O'Flynn v. City of Butte*, 493.

Objections not Raised in District Court—Appeal.

27. An objection to the introduction of testimony not urged in the district court will not be reviewed on appeal.—*O'Flynn v. City of Butte*, 493.

Sufficiency—False Imprisonment.

28. Evidence held sufficient to warrant recovery in an action for false imprisonment, where plaintiff was detained by defendant in his office for a period of about forty-five minutes, in an endeavor to secure from plaintiff a deed handed to her for inspection, and which she thereafter declined to return to defendant.—*Kroeger v. Passmore*, 504.

Conflicting—False Imprisonment—Review.

29. Where the evidence on the question of the false imprisonment of plaintiff was conflicting and sufficient to have justified a finding in favor of either party to the action, the verdict of the jury will not be disturbed.—*Kroeger v. Passmore*, 504.

Specific Performance—Review—Nonsuit.

30. Evidence of plaintiff in a suit to enforce the specific performance of an oral agreement for the sale of a lot, reviewed, and held sufficient to entitle plaintiff to a decree, and that the court erred in granting a "nonsuit."—*Stevens v. Trafton*, 520.

Positive and Negative—Weight.

31. When one witness testifies positively that a certain thing existed or happened, and another witness, with equal means of knowing, testifies that the thing did not exist or happen, the so-called negative testimony is so far positive in its character that a court cannot say that it is entitled to less weight than the affirmative testimony.—*Riley v. Northern Pacific Ry. Co.*, 545.

Admissibility—Harmless Error.

32. In an action for the death of one struck by a switch engine while crossing defendant's tracks, where it was shown that there was a gate at each side of the crossing, but that on account of the lessened travel between the hours of 12 o'clock midnight and 6 o'clock in the morning the gates were not used, and that the deceased was killed during such hours, and further, that the mayor had never designated the crossing as one where a flagman was required, it was not prejudicial to defendant to admit in evidence an ordinance requiring a railroad to keep a flagman at such crossings unprotected by gates as may be designated by the mayor from time to time, since the jury must have known that the mayor had never required a flagman at the crossing in question, and therefore could not have considered that the company was negligent in failing to provide a flagman at such crossing on account of the fact that the mayor had designated it as one of the crossings where a flagman should be employed.—*Riley v. Northern Pacific Ry. Co.*, 545.

EXCESSIVE DAMAGES.

See *Damages*, 1-3, 5.

EXCUSABLE NEGLECT.

See *Discretion*, 8.

EXECUTION.

See, also, *Injunction*, 1, 2.

Real Property—Sales—Purchaser from Judgment Debtor—Title Acquired—Liens—Deficiency Judgment.

1. Held, under section 1197, and sections 1233-1236, Code of Civil Procedure, that where real estate is sold under execution and bid in

by the judgment creditor for less than the amount of his judgment, the judgment debtor may transfer the interest remaining in him, during the period of redemption, to a third person, who, upon redemption within the statutory time, acquires the legal title free from the lien of a deficiency judgment theretofore entered.—*McQueeney v. Toomey*, 282.

Equity—Decrees—How Enforced.

2. A decree in equity directing the payment of money may be enforced by execution in the same manner as a judgment in an action at law.—*Raymond v. Blanckgras*, 449.

Husband and Wife—Separate Maintenance—Decree—Enforcement.

3. Where a wife recovers a judgment against her husband for separate maintenance, she becomes his creditor for the amount adjudged due at the time, and for amounts accruing from month to month, occupies toward him the position of any other creditor, is entitled to the same relief in equity, if she seeks the satisfaction of her claim, and may maintain an action at law upon any ground available to any other creditor.—*Raymond v. Blanckgras*, 449.

Personal Property—Sales—Statutes—Construction.

4. Section 1232, Code of Civil Procedure, relating to sheriff's sale under execution, provides that, when the purchaser of any "real" property, not capable of manual delivery, pays the purchase money, the officer making the sale must execute and deliver to him a certificate of sale. *Held*, that the word "real" in this section was used by mistake, and that the word "personal" should be substituted therefor.—*Raymond v. Blanckgras*, 449.

Equity—Adequacy of Remedy at Law.

5. *Held*, that a wife who had obtained a judgment against her husband for separate maintenance had a plain, speedy and adequate remedy at law by execution against persons alleged to have fraudulently conspired to defeat any decree she might obtain by disposing of the husband's property, and that therefore she could not sue in equity by way of a creditor's bill.—*Raymond v. Blanckgras*, 449.

FALSE IMPRISONMENT.

Nonsuit.

1. Evidence of plaintiff, in an action for false imprisonment, examined, and *held* to justify the refusal of a motion for nonsuit.—*Kroeger v. Passmore*, 504.

Evidence—Instructed Verdict.

2. Where the evidence of defendant, in an action for false imprisonment, did not make out so clear and indisputable a case as would have justified the court in giving a peremptory instruction for a verdict in his favor, its refusal to so direct was not error.—*Kroeger v. Passmore*, 504.

Evidence—Sufficiency.

3. Evidence *held* sufficient to warrant recovery in an action for false imprisonment, where plaintiff was detained by defendant in his office for a period of about forty-five minutes, in an endeavor to secure from plaintiff a deed handed to her for inspection, and which she thereafter declined to return to defendant.—*Kroeger v. Passmore*, 504.

What Constitutes.

4. All that is necessary to constitute false imprisonment is an individual's detention without sufficient legal cause therefor, and neither malice nor, ordinarily, want of probable cause, is an element of the right to recover damages.—*Kroeger v. Passmore*, 504.

Excessive Damages.

5. Where, in an action for false imprisonment, the evidence showed that plaintiff was detained in defendant's office for about three-quarters of an hour in an effort on defendant's part to obtain from her a deed handed to her for inspection, and which she refused to return, and that the result of such detention was sickness, nervousness, humiliation and disgrace to plaintiff, a verdict for \$250 held not to be excessive.—*Kroeger v. Passmore*, 504.

Defenses.

6. Treating false imprisonment as a tort, as distinguished from a crime, the only defenses which may be interposed are a denial of the imprisonment and a justification thereof.—*Kroeger v. Passmore*, 504.

Conflicting Evidence—Review.

7. Where the evidence on the question of the false imprisonment of plaintiff was conflicting and sufficient to have justified a finding in favor of either party to the action, the verdict of the jury will not be disturbed.—*Kroeger v. Passmore*, 504.

Justification.

8. When a private person seeks to justify the imprisonment by him of another, he must show that he has complied with the law which warrants such imprisonment.—*Kroeger v. Passmore*, 504.

Justification—Instructions.

9. An instruction requested by defendant, in an action for false imprisonment, to the effect that the law gives a private person the right to arrest another when the party arrested has committed, or is about to commit, a public offense in the presence of the party arresting (Pen. Code, sec. 1633), and that if the jury believed that plaintiff had taken from defendant property of the latter which he was attempting to recover at the time of the alleged imprisonment, verdict should be for defendant, was properly denied, since it failed to call the attention of the jury to the further fact that, in order to justify the imprisonment, the person arresting must have taken the one arrested before a magistrate without unnecessary delay, or delivered him to a police officer (Pen. Code, sec. 1643).—*Kroeger v. Passmore*, 504.

FALSE PRETENSES.

See Criminal Law, 3-9.

FINDINGS.

See, also, Highways, 1-5.

Appeal—Equity Cases—Scope of Review.

1. (On motion for Rehearing.) While in equity cases the supreme court, under amended section 21, Code of Civil Procedure (Laws 1903, Second Extra. Session, p. 7), is required "to review all questions of fact arising upon the evidence presented in the record * * * and determine the same," the review may go no further than to determine whether there is a decided preponderance in the evidence against the findings of the trial court, and it will not undertake to try a cause and determine it as does the district court.—*Pope v. Alexander*, 82.

Evidence—Insufficiency—New Trial.

2. Where the evidence in a water right suit did not preponderate in favor of a finding, attacked upon a motion for a new trial for insufficiency of the evidence to sustain it, but was conflicting and of such a character that different courts might reasonably have differed as

to the weight of it, an order granting the new trial will be affirmed.—*White v. Barling*, 413.

Modification—New Trial—Equity Cases.

3. A litigant, in an equity case, has the right to move for a modification of a finding, or ask for a new trial; hence, a trial court cannot dictate to the moving party to pursue the former method, so as to save the trouble and expense of a retrial.—*White v. Barling*, 413.

FIXTURES.

Real Property—Wrongful Attachment to—Effect of Deed.

1. Where one tortiously attaches to his land the house of another, then a chattel, by placing it upon a stone foundation, such house does not thereby become a part of the realty of the tort-feasor; hence, title to the house, good as against the original owner thereof, cannot be acquired by deed of the land with its appurtenances and improvements.—*Eisenhauer v. Quinn*, 368.

When Chattels Become Fixtures.

2. A chattel, to become an irremovable fixture, must have been annexed to the realty by the owner of the fixture, or with his consent.—*Eisenhauer v. Quinn*, 368.

Claim and Delivery.

3. Where one wrongfully attaches to his realty another's chattels, and without the latter's knowledge or consent, such chattels may be reclaimed in an action in claim and delivery, if they can be identified.—*Eisenhauer v. Quinn*, 368.

Wrongful Attachment to Realty—Purchaser for Value—When Defense not Available.

4. In the absence of statute, the defense of purchase for value and without notice is not available against the holder of the legal title; therefore, the person who claimed to have bought the house, referred to in paragraph 1, above, from the party who had tortiously attached it to his land and, thus, had not any title at all,—could not interpose such defense to the claim of the rightful owner.—*Eisenhauer v. Quinn*, 368.

Estoppel—Pleadings.

5. Since, to be available as a defense, estoppel must be pleaded, defendant in the action mentioned above, who failed to so plead, though he had ample opportunity so to do, could not rely upon that defense.—*Eisenhauer v. Quinn*, 368.

FORGERY.

See Criminal Law, 36, 37, 44-49.

FRAUD.

See, also, Equity, 2-4.

Pleadings.

1. While in pleading fraud the facts constituting it, and not the legal conclusion, must be stated, it is not necessary that all of the facts be set forth in detail, but if the ultimate probative facts are stated, it is sufficient.—*State v. Phillips*, 109.

GOVERNOR.

Failure to approve Act,—see Statutes and Statutory Construction, 10.

GRAND LARCENY.

See Criminal Law, 1, 2, 16-21.

HABEAS CORPUS.

Criminal Law—Information—Insufficiency—Appeal.

1. If an information is not merely defective, but states facts which do not constitute any crime known to the law, or undertakes to state such an offense, but the facts do not constitute it, and no addition to them, however full and complete, can supply what is essential, the court is without jurisdiction to put the defendant on trial, and, if convicted, he is entitled to his release on *habeas corpus*, even though he might secure the same relief on appeal.—In re Farrell, 254.

Forgery—Void Instrument—Seal.

2. Complainant was convicted under an information charging that, while acting as deputy clerk of the district court, he forged a juror's certificate. The certificate did not bear the seal required by section 4645 of the Political Code. *Held*, on application for writ of *habeas corpus*, that, section 4645 being mandatory and not directory merely, the certificate in the absence of the seal did not constitute a legal liability against the county, but was void on its face, that, therefore, a charge of forgery could not be predicated upon it, and that complainant was entitled to his release from custody.—In re Farrell, 254.

Criminal Law—"Individual Bankers"—Receiving Deposits When Bank Insolvent—Void Statute.

3. Complainant was convicted, under an information based upon section 986, Penal Code, for having received deposits as an "individual banker" when knowing that his bank was insolvent. The laws of this state make no provision for "individual" bankers, but do so for "private" bankers. Section 986, *supra*, appears to have been adopted from the state of New York after the courts of that state had construed the term "individual banker" to mean one other than a private banker, and after such term had acquired the fixed and definite meaning, in the law, of one who was authorized to do banking subject to the supervision of the banking law. *Held*, that the term "individual banker" does not mean a "private" banker, that, since under the laws of this state there is no such person as an individual banker, complainant was convicted of an offense not known to the Penal Code, that the judgment of conviction is void and complainant entitled to his release from custody as prayed in his application for writ of *habeas corpus*.—In re Wisner, 298.

HARMLESS ERROR.

See Criminal Law, 26, 29, 30, 56, 62; Equity, 4; Instructions, 23, 24, 33, 40.

HIGHWAYS.

Prescription—Evidence—Sufficiency—Review.

1. In an action to quiet title to a portion of a city lot, evidence reviewed and *held* not to so clearly preponderate against a finding of an adverse use by the public for the full statutory period as not to support a conclusion that the strip had become a public highway by prescription, and for that and the further reason that plaintiff had never at any time, until shortly before bringing his action, attempted to obstruct travel over or assert ownership of the strip, the finding of the trial

court will not be disturbed on appeal. (See, also, Opinion on Motion for Rehearing.)—Pope v. Alexander, 82.

Same—Appeal—Record—Evidence—Review.

2. Where in the record on appeal, in an action to quiet title to a portion of a city lot claimed by defendants to have been dedicated for street purposes, substantial portions of the evidence were unintelligible by reason of the witnesses, when referring to certain points upon plats before them, indicating them by the use of the words "here" and "there," without identification by means of marks or letters, thus making it impossible for the appellate court on a review of the evidence to understand the full purport of their statements, a finding that the strip of land in controversy had become a public highway by prescription will not be said to be contrary to the weight of the evidence. (See, also, Opinion on Motion for Rehearing.)—Pope v. Alexander, 82.

Same—Findings—Evidence—Sufficiency.

3. While the evidence of a party seeking to establish a public highway by prescription, without color of title, by proof of travel over it for the statutory period, must clearly and convincingly show a use of the identical strip of land over which the right is claimed, and travel generally over an uninclosed lot of ground is not sufficient, yet where the evidence tended to show a definite line of travel over such land for a period of twenty-three years, and where the party asserting ownership knew of the conditions existing, but did not attempt to interfere with or question the right acquired by such use, a finding of adverse use for the statutory period will not be overturned on appeal. (See, also, Opinion on Motion for Rehearing.)—Pope v. Alexander, 82.

Same—Findings—Evidence—Harmless Error.

4. The correctness of a finding of adverse use of a portion of a city lot for a sufficient length of time to establish a street by prescription, is not affected by an alleged error of the court in making a finding upon the subject of dedication based on incompetent evidence.—Pope v. Alexander, 82.

Same—Appeal—Record—Findings—Evidence—Sufficiency—Presumptions.

5. (On Motion for Rehearing.) Where much of the testimony presented for review, in an action wherein it was sought to establish a street by prescription, was unintelligible by failure of counsel to have witnesses designate by some mode of identification certain points upon maps introduced in evidence, the presumption must obtain that the testimony, thus rendered unintelligible on review, was understood by the court making it as lending support to its finding in favor of the issue. Pope v. Alexander, 82.

HUSBAND AND WIFE.

Separate Maintenance—Decree—Enforcement.

1. Where a wife recovers a judgment against her husband for separate maintenance, she becomes his creditor for the amount adjudged due at the time, and for amounts accruing from month to month, occupies toward him the position of any other creditor, is entitled to the same relief in equity if she seeks the satisfaction of her claim, and may maintain an action at law upon any ground available to any other creditor.—Raymond v. Blancgrass, 449.

Separate Maintenance—Conversion—Complaint—Sufficiency.

2. The complaint of a wife, who had obtained a decree against her husband for separate maintenance, in an action to recover damages from third persons for conspiracy, alleged to have been entered into with a view to defeat any decree she might obtain, by removing and disposing of her husband's chattels, was insufficient where it did not

appear therefrom that she had any special right in the property, and where the conversion occurred prior to the time she became her husband's creditor by the entry of the decree in the suit for separate maintenance.—*Raymond v. Blancgrass*, 449.

Equity—Adequacy of Remedy at Law.

3. *Held*, that a wife who had obtained a judgment against her husband for separate maintenance had a plain, speedy and adequate remedy at law by execution against persons alleged to have fraudulently conspired to defeat any decree she might obtain, by disposing of the husband's property, and that therefore she could not sue in equity by way of a creditor's bill.—*Raymond v. Blancgrass*, 449.

Dower—Judgment Against Husband—Effect.

4. The lien of a judgment against a husband is subject to the interest of his wife, whether arising from a tenancy in common with her husband or out of her right of dower.—*Manuel v. Turner*, 512.

IDENTIFICATION.

See Mines and Mining, 1, 2; Mortgages, 1.

IMPEACHMENT.

See Evidence, 23.

INFORMATION.

1. Burglary, attempt,—see Criminal Law, 10-13.
2. False Pretenses, sufficiency,—see Criminal Law, 3.
3. Forgery,—see Criminal Law, 36, 37, 44, 45, 47.
4. Homicide,—see Criminal Law, 52, 54.
5. Insufficiency, *habeas corpus*,—see Criminal Law, 35, 41.
6. Prior conviction,—see Criminal Law, 25, 26, 28.
7. Robbery,—see Criminal Law, 23, 24.
8. Surplusage,—see Criminal Law, 7, 28, 44, 53.

INJUNCTION.

Execution Sale.

1. Under section 1201 of the Code of Civil Procedure, a judgment debtor whose property was about to be sold under execution after the judgment had been otherwise satisfied, had a plain, speedy and adequate remedy at law, and therefore injunction did not lie to restrain the sale. *Donovan v. McDevitt*, 61.

Execution Sale—Complaint—Sufficiency.

2. The complaint in an action to enjoin the levying of an execution issued upon a deficiency judgment, which alleged that an execution had been issued in a cause wherein one C. was defendant, that the sheriff levied upon and sold the property in controversy as the property of C. and that thereafter C., the judgment debtor, for value sold and conveyed the premises by a good and sufficient deed to plaintiff, sufficiently alleged the ownership of C., in the absence of a demurrer, assuming that such an allegation was necessary.—*McQueeney v. Toomey*, 282.

Complaint—Requisites.

3. Plaintiff, in his complaint for an injunction restraining a sheriff from removing a house, theretofore adjudged in an action in claim and delivery to belong to one from whom it had been wrongfully taken, attached to the tort-feasor's land and later by him sold to plaintiff, simply alleged that he had no plain, speedy or adequate

remedy at law. He failed to state that the sheriff was insolvent, or that his official bond was insufficient; nor was there an allegation that the injury which would be occasioned to plaintiff by removal of the house could not be compensated in damages. *Held*, that in the absence of such allegations, the complaint failed to state a cause of action for an injunction.—*Eisenhauer v. Quinn*, 368.

INSANITY.

See Criminal Law, 56, 61, 62, 66, 67.

INSTRUCTIONS.

Promissory Notes—Payment—Burden of Proof.

1. Instructions, given in an action on a promissory note, that if it appeared by a preponderance of the evidence that payment had not been made, plaintiff was entitled to recover, and that, on the contrary, if it appeared in the same way that payment had been made, the defendants were entitled to a verdict, were not objectionable as casting the burden of proving nonpayment upon plaintiff, or because of the absence of a statement as to what should be done in case of an equipoise in the evidence on the issue of payment, and could not have misled the jury, where in other parts of the charge they had been told that the burden was upon defendants to establish payment by a preponderance of the evidence, and that plaintiff's possession of the note was to be considered by them as *prima facie* evidence that it had not been paid.—*McCauley v. Darrow*, 13.

Promissory Notes—Limiting Effect of Evidence—Issues.

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of such employment, if they found that such temporary employment was of a peculiarly dangerous character.—*Stephens v. Elliott*, 92.

Same—Master and Servant—Unsafe Machinery—Duty of Master.

6. The fact that defendant, as employer of plaintiff, did not know of defects in a piece of machinery by reason of which an injury was caused to the latter, is immaterial, if, by the exercise of ordinary care, he should have known of them; and, therefore, an instruction was not objectionable because it failed to advise the jury that in order to find for plaintiff they must find that defendant had knowledge of the alleged defects.—*Stephens v. Elliott*, 92.

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7. An instruction, given in the action above, which, if standing alone, would have warranted a verdict for plaintiff, even though guilty of contributory negligence, was not erroneous, where in other instructions the subject of contributory negligence had been fully and clearly covered. Instructions should be considered as a whole.—*Stephens v. Elliott*, 92.

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Same—Contributory Negligence—Assumption of Risk—Burden of Proof.

9. Instructions, given in an action to recover damages for personal injuries, charging the jury that the burden of proof to establish the defenses of contributory negligence and assumption of risk was upon defendant, were correct, where the evidence on the part of plaintiff did not show, or tend to show, that his negligence contributed to his injury, or that he assumed the risk incident to his employment.—*Stephens v. Elliott*, 92.

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Criminal Law—Definition of "Larceny"—Intent.

12. In a prosecution for grand larceny, the court gave a definition of "larceny" in the language of section 880 of the Penal Code. The jury were further told that in every crime or public offense there must exist a union or joint operation of act and intent. It further charged that to find the defendant guilty it was sufficient to show that he had appropriated the property mentioned in the information "without color of right or authority." *Held*, that these instructions were erroneous, for the reason that they omitted the element of felonious or criminal intent.—*State v. Peterson*, 109.

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13. The error, committed in charging that the defendant, accused of grand larceny, could be found guilty if he appropriated the property "without color of right or authority," was not cured by the addition of the words "and with intent to steal the same," since the word "steal" could not have been understood by the jury as having any broader import than that given to the term "larceny" by the court in the instruction referred to in the above paragraph.—*State v. Peterson*, 109.

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Refusal—When not Error.

16. Refusal of instructions relative to subjects sufficiently covered by those given is not error.—*State v. Phillips*, 112.

Master and Servant—Personal Injuries—Contributory Negligence—Definition.

17. It was error to instruct the jury, in an action by an employee to recover damages from his employer for personal injuries, that contributory negligence constituted "such negligence upon the part of the plaintiff that, but for the same, he would not have been injured." The court in this instruction omitted from the definition a statement that such negligence must have concurred or co-operated with the negligent act of the defendant as a proximate cause of the injury complained of.—*Leary v. Anaconda C. Min. Co.*, 157.

Same—Contributory Negligence—Proximate Cause.

18. Where plaintiff, a miner, claimed to have been injured, by the falling of timber through a chute in which it was being hoisted to an upper level of the mine, the court erred in charging the jury that, if plaintiff could, in the exercise of reasonable care, have stepped into a position of safety, but, instead of doing so, remained exposed in a position of greater hazard and danger than was necessary, and such conduct on his part contributed to, and was the proximate cause of, his injury, he could not recover,—since, by the use of the definite article "the," instead of the indefinite "a," the jury may have been misled into believing that plaintiff's right to recover damages was not barred unless his negligence was the sole causal agency in producing the injury.—*Leary v. Anaconda C. Min. Co.*, 157.

Same—Assumption of Risk.

19. A servant, by virtue of his contract of employment, not only tacitly agrees to assume such risks as are incident to his employment, but also such as should become apparent to him by ordinary observation, or are readily discernible by a person of his age and capacity, and such as he discovers but fails to call to the attention of his employer; hence, an instruction that the risks assumed by the servant,

as ordinarily incident to the character of his work, were only such as an ordinarily reasonable man, with his experience, could or might have, in the exercise of ordinary diligence and observation, discovered, announced an erroneous principle of law.—*Leary v. Anaconda C. Min. Co.*, 157.

Same—Safe Appliances—Duty of Master.

20. With respect to the appliances furnished the servant by the master, the latter owes the former the duty only of exercising ordinary care, and to keep them in a reasonably safe condition; therefore, an instruction that it was the duty of defendant mining company to provide a reasonably safe and sufficient rope and chute with which and through which to hoist timbers, to make reasonable inspection thereof, to use ordinary care in so doing, and that defendant was liable if its inspection failed to discover what a reasonable examination would have disclosed, was erroneous.—*Leary v. Anaconda C. Min. Co.*, 157.

Same—Appliances—Inspection.

21. The court charged that, even though the workmen employed about that portion of the mine where plaintiff was injured, or the timbermen, could have inspected the chute or rope, the alleged defect in which caused the injury, and, if they had found either insufficient or unsafe, could have reported the same, when defendant would have furnished a new rope or repaired the chute, this would not constitute a defense if the chute was not reasonably safe, and plaintiff, by reason thereof, sustained damage without fault on his part and without knowing the risk, but such matters, with other facts and circumstances, might be considered by the jury in determining what would be a reasonable inspection, and whether defendant performed its duty to inspect. *Held*, that the instruction placed too great a burden on defendant company in the way of responsibility to its servants and practically amounted to a statement that plaintiff could recover in any event.—*Leary v. Anaconda C. Min. Co.*, 157.

Record—Review.

22. Where the record in a criminal cause, tried after Chapter 82 of the Laws of 1907, page 197, went into effect, providing that the trial court shall pass upon any objections to instructions requested or proposed to be given, and that the court stenographer shall be present at the settlement of the instructions and note all objections and exceptions of counsel to those given or refused, does not show that the court ruled, or was requested to rule, on defendant's requests for instructions or his objections to those given, errors relating to them will not be considered on appeal, since error cannot be predicated on the mere silence of the court.—*State v. McCarthy*, 226.

Robbery—Prior Conviction—Punishment—Harmless Error.

23. Where defendant was charged with robbery and prior convictions, the giving of an instruction, on the question of punishment, embracing all the subdivisions of section 1232, Penal Code, while only subdivision 1 should have been given, subdivisions 2 and 3 having reference to offenses the punishment for which is five years or less, was improper, but rendered harmless by an instruction embodying the provisions of section 392, Penal Code, prescribing the maximum punishment for robbery at twenty years' imprisonment.—*State v. Paisley*, 237.

Same.

24. Nor was the giving of instructions defining burglary and prescribing its punishment prejudicial, in the above case, where defendant was also charged with having been previously convicted of burglary; while it would have been sufficient to have charged the jury that such latter offense was punishable by imprisonment in the state prison, the

fact that the court was more elaborate in this respect than was necessary could not have harmed defendant, since what the court did say was correct.—*State v. Paisley*, 237.

Same—Appeal—Record—Presumptions.

25. An instruction was given by the court in a prosecution for robbery, referring to "the last two instructions" on the subject of punishment which might be inflicted. Neither of these instructions, however, dealt with that subject. The jury, after retiring, returned into court and requested further instructions relative to the matter of punishment. Such instructions were given, but the record was silent as to their nature. The certificate of the clerk was to the effect that the record contained copies of all papers constituting the judgment-roll. *Held*, that, since it is incumbent upon appellant to point out the specific error upon which he relies, and since proper instructions on the subject of punishment were given, in the absence of anything to show which instructions were given in response to the request of the jury, the presumption in favor of the action of the trial court will be indulged.—*State v. Paisley*, 237.

Same—Flight and Concealment.

26. An instruction which substantially told the jury in a criminal action that if they were satisfied that the crime charged in the information had been committed by some one, they might then, in determining the defendant's guilt, take into consideration any testimony showing or tending to show flight or concealment on his part, was correct.—*State v. Paisley*, 237.

Same—Alibi—Burden of Proof.

27. Where the jury in a criminal cause had been properly instructed that the burden of proving, beyond a reasonable doubt, that defendant was present and participated in the alleged crime, a subsequent one stating simply that one of the defenses interposed by defendant was an *alibi* and defining that term, was not objectionable as impliedly casting the burden of proving that defense upon the defendant.—*State v. Paisley*, 237.

Requested Instructions—Refusal—When not Error.

28. The refusal of defendant's requested instructions is not error where the matter embraced in them is fully covered by those given.—*State v. Paisley*, 237.

Criminal Law—Evidence—Police Officers—Detectives—Credibility.

29. An instruction, requested by defendant charged with crime, to the effect that, in weighing the testimony given by police officers and detectives, the jury should exercise greater care than in the case of other witnesses, because of the natural and unavoidable tendency and bias of such persons to construe everything as evidence against the accused and disregard all matters which did not tend to support their preconceived opinions of the case, was properly refused. If given, it would have invaded the province of the jury and been erroneous under any circumstances.—*State v. Paisley*, 237.

Forgery—Falsely Making—Altering—Applicability to Issues.

30. Where defendant was charged with having forged a promissory note, not by altering it, but by falsely making the same, an instruction telling the jury, *inter alia*, that to constitute the crime of forgery it was sufficient if a genuine instrument "be altered so that it is not the instrument signed by the maker," etc., was erroneous, since in order to charge the offense by alteration, the information must clearly set forth the particulars in which the paper was altered.—*State v. Mitten*, 376.

Abstract Statements of Law.

31. Instructions, though correct as abstract propositions of law, should not be given to the jury if they do not relate to the issues made by the pleadings.—*State v. Mitten*, 376.

Ditches—Seepage—Liability of Owner.

32. Plaintiff, in an action to recover damages alleged to have been caused to his lands by seepage from defendant's ditch, asked the court to instruct the jury that if the injury was caused as alleged, the verdict should be for plaintiff, irrespective of the question of negligence on the part of defendant in the construction and operation of the ditch. This was refused and one given, in lieu thereof, announcing the rule that defendant was only bound to exercise ordinary care in the construction and maintenance of his ditch, and that if he did so, he could not be held responsible. *Held*, that the court's action was correct.—*Fleming v. Lockwood*, 384.

Ditches—Negligence—Degree of Proof—Harmless Error.

33. While it was error to instruct the jury in the case above mentioned that, before plaintiff could recover, he must have established by a *clear* preponderance of the evidence that the ditch in question was negligently and defectively constructed or maintained, etc.—thus, by the use of the word "*clear*," imposing a greater burden upon plaintiff than the law requires—the error was harmless, where plaintiff did not rely upon defendant's negligence nor offer any evidence on that question, but took the erroneous position that defendant was an insurer of his ditch and responsible in any event, and where the court would have been justified in directing a verdict for defendant, in that plaintiff had failed to make out a case.—*Fleming v. Lockwood*, 384.

Criminal Law—Definition of Murder.

34. Where the jury, in a capital case, had been instructed on the definition of murder, it was not necessary to again charge in a later instruction, which told them that if they found that accused had murdered decedent, and they did not find him guilty of murder in the first degree, they should find him guilty of murder in the second degree, that the word "*murder*" should be construed to mean the offense defined in the Penal Code, as set forth in preceding instructions.—*State v. McGowan*, 422.

Same—Intent.

35. Defendant was not prejudiced by the giving of an instruction on the question of criminal intent, which, among other things, stated that they should determine whether at the time of the killing defendant had the mental capacity to entertain a criminal act, the court inadvertently substituting the word "*act*" for "*intent*," where, in other instructions, the jury had been repeatedly referred to the distinction between the intent of the defendant and the mere act of killing, and told that in every crime there must exist a union or joint operation of act and intent.—*State v. McGowan*, 422.

Same—Use of Word "Crime."

36. The use of the word "*crime*" in an instruction in several instances, among others in the statement, that if the jury believed beyond a reasonable doubt that defendant committed "*the crime of which he is accused*," was not error as indicating that the court had formed the opinion that the necessary elements of the offense had been proven against the defendant, since the jury must have understood that the words "*of which he is accused*" qualified the term "*crime*" wherever used in the instruction.—*State v. McGowan*, 422.

Same—Insanity.

37. The statement in an instruction, given in a trial for homicide, on the subject of insanity, that if defendant was mentally capable of choosing either to do or not to do the act constituting the crime of which he was charged, and of governing his conduct in accordance with such choice, a verdict of guilty should be rendered, even though the jury believed that at the time of the commission of the crime he was not entirely and perfectly sane, was correct.—*State v. McGowan*, 422.

Same—Manslaughter.

38. Where the evidence in a trial for homicide showed that defendant was either guilty of deliberate murder or not guilty by reason of insanity, which was the only defense interposed, the failure of the court of its own motion to give an instruction on the crime of manslaughter was not error.—*State v. McGowan*, 422.

Review.

39. In reviewing a charge to the jury, the supreme court will examine it as a whole, and if then the instructions fully and fairly submit the case, the judgment will not be reversed on the ground that some of them, standing alone, are inaccurate or even prejudicially erroneous, if these latter are qualified and explained by other portions of the charge *in pari materia*.—*Harrington v. Butte, Anaconda & Pac. Ry. Co.*, 478.

Action for Wages—Harmless Error.

40. In an action to recover wages due for services to a partnership of which defendant was a member, which it was alleged he agreed to pay upon a final settlement between the partners, an instruction that, unless defendant at the time of making the promise had funds of the partnership sufficient to pay the debt, there was no consideration for his promise, if erroneous, was harmless error, where the jury, by finding for plaintiff, must have found that defendant did have sufficient funds to pay the debt.—*Carlson v. Barker*, 486.

Cities and Towns—Sidewalks—Presumptions.

41. An instruction that a person in the exercise of ordinary care, and without knowledge of any defects in, or the dangerous condition of, a sidewalk, might rely on the presumption that the sidewalk was in an ordinarily safe condition for travel, was not objectionable for failure to charge that, if the traveler had previous knowledge of the dangerous condition of the walk, the presumption did not apply. The rule laid down was correct, and if defendant relied upon plaintiff's knowledge as nullifying the effect of the presumption, it should have asked an instruction covering the point.—*O'Flynn v. City of Butte*, 493.

Same—Defective Walks—Notice.

42. An instruction charging the jury that a city must have had either actual or constructive notice of the defective condition of a sidewalk for a sufficient length of time prior to the injury claimed to have been sustained on account thereof, so as to enable it to repair the walk, was not objectionable as outside of the issues, where the complaint averred that the defendant carelessly and negligently permitted the walk to be and remain in a dangerous and unsafe condition for a long time prior to the date of the accident, and that this condition was "for a long time prior to the injury known to the defendant," thus sufficiently negating the idea that the defect was not known to defendant for a sufficient length of time to enable it to repair it.—*O'Flynn v. City of Butte*, 493.

False Imprisonment—Instructed Verdict.

43. Where the evidence of defendant, in an action for false imprisonment, did not make out so clear and indisputable a case as would have

justified the court in giving a peremptory instruction for a verdict in his favor, its refusal to so direct was not error.—*Kroeger v. Passmore*, 504.

False Imprisonment—Justification.

44. An instruction requested by defendant, in an action for false imprisonment, to the effect that the law gives a private person the right to arrest another when the party arrested has committed, or is about to commit, a public offense in the presence of the party arresting (Pen. Code, sec. 1633), and that if the jury believed that plaintiff had taken from defendant property of the latter which he was attempting to recover at the time of the alleged imprisonment, verdict should be for defendant, was properly denied, since it failed to call the attention of the jury to the further fact that, in order to justify the imprisonment, the person arresting must have taken the one arrested before a magistrate without unnecessary delay, or delivered him to a police officer (Pen. Code, sec. 1643).—*Kroeger v. Passmore*, 504.

Criminal Law—Reasonable Doubt.

45. An instruction defining the term "reasonable doubt" in the language employed for that purpose in *Territory v. McAndrews*, 3 Mont., at page 162, and there approved and since accepted as a proper definition of those words, is not open to the objection that by it the jury were confined to a consideration of the evidence, whereas a reasonable doubt might arise from the lack of evidence.—*State v. De Lea*, 531.

Same—Credibility of Defendant.

46. While it is the general rule that a court ought not in its instructions single out a particular witness and direct the attention of the jury to his testimony, section 2442, Penal Code, makes an exception to this rule, and the court may properly instruct that the jury, in judging the credibility of one on trial for a crime and the weight to be given to his testimony, may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he stands charged.—*State v. De Lea*, 531.

Same—Larceny—Definition—Curing Error.

47. The defect in an instruction which incorrectly defined "larceny" was cured by a subsequent one, which, though not technically correct, was not open to the objection urged against it by appellant.—*State v. De Lea*, 531.

Review.

48. In reviewing instructions they must be considered as a whole.—*State v. De Lea*, 531.

Railroads—Negligent Killing.

49. The giving of an instruction, in an action to recover damages from a railway company for the negligent killing of a pedestrian while crossing its tracks, substantially consisting of a statement of the pleadings, was not reversible error.—*Riley v. Northern Pac. Ry. Co.*, 545.

Railroads—Injuries at Crossings.

50. In an action for damages for the death of one struck by an engine while crossing defendant's tracks, there was evidence for defendant that the bell was ringing and a headlight burning. Plaintiff's witnesses testified that they did not hear any bell or see any light. Defendant's witnesses swore that they did not see the deceased at all, although the engineer claimed he was looking toward the very spot where the accident happened. *Held*, that the court properly refused to charge that it was proved by the uncontradicted evidence that the bell was ringing and the headlight burning, that the ringing and the light were a sufficient warning, and that, if no other negligence was

remedy at law. He failed to state that the sheriff was insolvent, or that his official bond was insufficient; nor was there an allegation that the injury which would be occasioned to plaintiff by removal of the house could not be compensated in damages. *Held*, that in the absence of such allegations, the complaint failed to state a cause of action for an injunction.—*Eisenhauer v. Quinn*, 368.

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Criminal Law—Precautionary Instruction—Discretion.

15. In a prosecution for crime it is discretionary with the trial court to give, or refuse, an instruction cautioning the jury as to the duty of each member thereof not to vote for a verdict of guilty, if he entertain a reasonable doubt, merely because a majority should be in favor of such a verdict, and not to yield his conscientious convictions as to the guilt or innocence of the accused to the will of the majority for the sake of humanity or to prevent a mistrial.—*State v. Phillips*, 112.

Refusal—When not Error.

16. Refusal of instructions relative to subjects sufficiently covered by those given is not error.—*State v. Phillips*, 112.

Master and Servant—Personal Injuries—Contributory Negligence—Definition.

17. It was error to instruct the jury, in an action by an employee to recover damages from his employer for personal injuries, that contributory negligence constituted "such negligence upon the part of the plaintiff that, but for the same, he would not have been injured." The court in this instruction omitted from the definition a statement that such negligence must have concurred or co-operated with the negligent act of the defendant as a proximate cause of the injury complained of.—*Leary v. Anaconda C. Min. Co.*, 157.

Same—Contributory Negligence—Proximate Cause.

18. Where plaintiff, a miner, claimed to have been injured, by the falling of timber through a chute in which it was being hoisted to an upper level of the mine, the court erred in charging the jury that, if plaintiff could, in the exercise of reasonable care, have stepped into a position of safety, but, instead of doing so, remained exposed in a position of greater hazard and danger than was necessary, and such conduct on his part contributed to, and was the proximate cause of, his injury, he could not recover,—since, by the use of the definite article "the," instead of the indefinite "a," the jury may have been misled into believing that plaintiff's right to recover damages was not barred unless his negligence was the sole causal agency in producing the injury.—*Leary v. Anaconda C. Min. Co.*, 157.

Same—Assumption of Risk.

19. A servant, by virtue of his contract of employment, not only tacitly agrees to assume such risks as are incident to his employment, but also such as should become apparent to him by ordinary observation, or are readily discernible by a person of his age and capacity, and such as he discovers but fails to call to the attention of his employer; hence, an instruction that the risks assumed by the servant,

as ordinarily incident to the character of his work, were only such as an ordinarily reasonable man, with his experience, could or might have, in the exercise of ordinary diligence and observation, discovered, announced an erroneous principle of law.—*Leary v. Anaconda C. Min. Co.*, 157.

Same—Safe Appliances—Duty of Master.

20. With respect to the appliances furnished the servant by the master, the latter owes the former the duty only of exercising ordinary care, and to keep them in a reasonably safe condition; therefore, an instruction that it was the duty of defendant mining company to provide a reasonably safe and sufficient rope and chute with which and through which to hoist timbers, to make reasonable inspection thereof, to use ordinary care in so doing, and that defendant was liable if its inspection failed to discover what a reasonable examination would have disclosed, was erroneous.—*Leary v. Anaconda C. Min. Co.*, 157.

Same—Appliances—Inspection.

21. The court charged that, even though the workmen employed about that portion of the mine where plaintiff was injured, or the timbermen, could have inspected the chute or rope, the alleged defect in which caused the injury, and, if they had found either insufficient or unsafe, could have reported the same, when defendant would have furnished a new rope or repaired the chute, this would not constitute a defense if the chute was not reasonably safe, and plaintiff, by reason thereof, sustained damage without fault on his part and without knowing the risk, but such matters, with other facts and circumstances, might be considered by the jury in determining what would be a reasonable inspection, and whether defendant performed its duty to inspect. *Held*, that the instruction placed too great a burden on defendant company in the way of responsibility to its servants and practically amounted to a statement that plaintiff could recover in any event.—*Leary v. Anaconda C. Min. Co.*, 157.

Record—Review.

22. Where the record in a criminal cause, tried after Chapter 82 of the Laws of 1907, page 197, went into effect, providing that the trial court shall pass upon any objections to instructions requested or proposed to be given, and that the court stenographer shall be present at the settlement of the instructions and note all objections and exceptions of counsel to those given or refused, does not show that the court ruled, or was requested to rule, on defendant's requests for instructions or his objections to those given, errors relating to them will not be considered on appeal, since error cannot be predicated on the mere silence of the court.—*State v. McCarthy*, 226.

Robbery—Prior Conviction—Punishment—Harmless Error.

23. Where defendant was charged with robbery and prior convictions, the giving of an instruction, on the question of punishment, embracing all the subdivisions of section 1232, Penal Code, while only subdivision 1 should have been given, subdivisions 2 and 3 having reference to offenses the punishment for which is five years or less, was improper, but rendered harmless by an instruction embodying the provisions of section 392, Penal Code, prescribing the maximum punishment for robbery at twenty years' imprisonment.—*State v. Paisley*, 237.

Same.

24. Nor was the giving of instructions defining burglary and prescribing its punishment prejudicial, in the above case, where defendant was also charged with having been previously convicted of burglary; while it would have been sufficient to have charged the jury that such latter offense was punishable by imprisonment in the state prison, the

fact that the court was more elaborate in this respect than was necessary could not have harmed defendant, since what the court did say was correct.—*State v. Paisley*, 237.

Same—Appeal—Record—Presumptions.

25. An instruction was given by the court in a prosecution for robbery, referring to "the last two instructions" on the subject of punishment which might be inflicted. Neither of these instructions, however, dealt with that subject. The jury, after retiring, returned into court and requested further instructions relative to the matter of punishment. Such instructions were given, but the record was silent as to their nature. The certificate of the clerk was to the effect that the record contained copies of all papers constituting the judgment-roll. *Held*, that, since it is incumbent upon appellant to point out the specific error upon which he relies, and since proper instructions on the subject of punishment were given, in the absence of anything to show which instructions were given in response to the request of the jury, the presumption in favor of the action of the trial court will be indulged.—*State v. Paisley*, 237.

Same—Flight and Concealment.

26. An instruction which substantially told the jury in a criminal action that if they were satisfied that the crime charged in the information had been committed by some one, they might then, in determining the defendant's guilt, take into consideration any testimony showing or tending to show flight or concealment on his part, was correct.—*State v. Paisley*, 237.

Same—Alibi—Burden of Proof.

27. Where the jury in a criminal cause had been properly instructed that the burden of proving, beyond a reasonable doubt, that defendant was present and participated in the alleged crime, a subsequent one stating simply that one of the defenses interposed by defendant was an *alibi* and defining that term, was not objectionable as impliedly casting the burden of proving that defense upon the defendant.—*State v. Paisley*, 237.

Requested Instructions—Refusal—When not Error.

28. The refusal of defendant's requested instructions is not error where the matter embraced in them is fully covered by those given.—*State v. Paisley*, 237.

Criminal Law—Evidence—Police Officers—Detectives—Credibility.

29. An instruction, requested by defendant charged with crime, to the effect that, in weighing the testimony given by police officers and detectives, the jury should exercise greater care than in the case of other witnesses, because of the natural and unavoidable tendency and bias of such persons to construe everything as evidence against the accused and disregard all matters which did not tend to support their preconceived opinions of the case, was properly refused. If given, it would have invaded the province of the jury and been erroneous under any circumstances.—*State v. Paisley*, 237.

Forgery—Falsely Making—Altering—Applicability to Issues.

30. Where defendant was charged with having forged a promissory note, not by altering it, but by falsely making the same, an instruction telling the jury, *inter alia*, that to constitute the crime of forgery it was sufficient if a genuine instrument "be altered so that it is not the instrument signed by the maker," etc., was erroneous, since in order to charge the offense by alteration, the information must clearly set forth the particulars in which the paper was altered.—*State v. Mitten*, 376.

Abstract Statements of Law.

31. Instructions, though correct as abstract propositions of law, should not be given to the jury if they do not relate to the issues made by the pleadings.—*State v. Mitten*, 376.

Ditches—Seepage—Liability of Owner.

32. Plaintiff, in an action to recover damages alleged to have been caused to his lands by seepage from defendant's ditch, asked the court to instruct the jury that if the injury was caused as alleged, the verdict should be for plaintiff, irrespective of the question of negligence on the part of defendant in the construction and operation of the ditch. This was refused and one given, in lieu thereof, announcing the rule that defendant was only bound to exercise ordinary care in the construction and maintenance of his ditch, and that if he did so, he could not be held responsible. *Held*, that the court's action was correct.—*Fleming v. Lockwood*, 384.

Ditches—Negligence—Degree of Proof—Harmless Error.

33. While it was error to instruct the jury in the case above mentioned that, before plaintiff could recover, he must have established by a *clear* preponderance of the evidence that the ditch in question was negligently and defectively constructed or maintained, etc.—thus, by the use of the word "*clear*," imposing a greater burden upon plaintiff than the law requires—the error was harmless, where plaintiff did not rely upon defendant's negligence nor offer any evidence on that question, but took the erroneous position that defendant was an insurer of his ditch and responsible in any event, and where the court would have been justified in directing a verdict for defendant, in that plaintiff had failed to make out a case.—*Fleming v. Lockwood*, 384.

Criminal Law—Definition of Murder.

34. Where the jury, in a capital case, had been instructed on the definition of murder, it was not necessary to again charge in a later instruction, which told them that if they found that accused had murdered decedent, and they did not find him guilty of murder in the first degree, they should find him guilty of murder in the second degree, that the word "*murder*" should be construed to mean the offense defined in the Penal Code, as set forth in preceding instructions.—*State v. McGowan*, 422.

Same—Intent.

35. Defendant was not prejudiced by the giving of an instruction on the question of criminal intent, which, among other things, stated that they should determine whether at the time of the killing defendant had the mental capacity to entertain a criminal act, the court inadvertently substituting the word "*act*" for "*intent*," where, in other instructions, the jury had been repeatedly referred to the distinction between the intent of the defendant and the mere act of killing, and told that in every crime there must exist a union or joint operation of act and intent.—*State v. McGowan*, 422.

Same—Use of Word "Crime."

36. The use of the word "*crime*" in an instruction in several instances, among others in the statement, that if the jury believed beyond a reasonable doubt that defendant committed "*the crime of which he is accused*," was not error as indicating that the court had formed the opinion that the necessary elements of the offense had been proven against the defendant, since the jury must have understood that the words "*of which he is accused*" qualified the term "*crime*" wherever used in the instruction.—*State v. McGowan*, 422.

Same—Insanity.

37. The statement in an instruction, given in a trial for homicide, on the subject of insanity, that if defendant was mentally capable of choosing either to do or not to do the act constituting the crime of which he was charged, and of governing his conduct in accordance with such choice, a verdict of guilty should be rendered, even though the jury believed that at the time of the commission of the crime he was not entirely and perfectly sane, was correct.—*State v. McGowan*, 422.

Same—Manslaughter.

38. Where the evidence in a trial for homicide showed that defendant was either guilty of deliberate murder or not guilty by reason of insanity, which was the only defense interposed, the failure of the court of its own motion to give an instruction on the crime of manslaughter was not error.—*State v. McGowan*, 422.

Review.

39. In reviewing a charge to the jury, the supreme court will examine it as a whole, and if then the instructions fully and fairly submit the case, the judgment will not be reversed on the ground that some of them, standing alone, are inaccurate or even prejudicially erroneous, if these latter are qualified and explained by other portions of the charge *in pari materia*.—*Harrington v. Butte, Anaconda & Pac. Ry. Co.*, 478.

Action for Wages—Harmless Error.

40. In an action to recover wages due for services to a partnership of which defendant was a member, which it was alleged he agreed to pay upon a final settlement between the partners, an instruction that, unless defendant at the time of making the promise had funds of the partnership sufficient to pay the debt, there was no consideration for his promise, if erroneous, was harmless error, where the jury, by finding for plaintiff, must have found that defendant did have sufficient funds to pay the debt.—*Carlson v. Barker*, 486.

Cities and Towns—Sidewalks—Presumptions.

41. An instruction that a person in the exercise of ordinary care, and without knowledge of any defects in, or the dangerous condition of, a sidewalk, might rely on the presumption that the sidewalk was in an ordinarily safe condition for travel, was not objectionable for failure to charge that, if the traveler had previous knowledge of the dangerous condition of the walk, the presumption did not apply. The rule laid down was correct, and if defendant relied upon plaintiff's knowledge as nullifying the effect of the presumption, it should have asked an instruction covering the point.—*O'Flynn v. City of Butte*, 493.

Same—Defective Walks—Notice.

42. An instruction charging the jury that a city must have had either actual or constructive notice of the defective condition of a sidewalk for a sufficient length of time prior to the injury claimed to have been sustained on account thereof, so as to enable it to repair the walk, was not objectionable as outside of the issues, where the complaint averred that the defendant carelessly and negligently permitted the walk to be and remain in a dangerous and unsafe condition for a long time prior to the date of the accident, and that this condition was "for a long time prior to the injury known to the defendant," thus sufficiently negating the idea that the defect was not known to defendant for a sufficient length of time to enable it to repair it.—*O'Flynn v. City of Butte*, 493.

False Imprisonment—Instructed Verdict.

43. Where the evidence of defendant, in an action for false imprisonment, did not make out so clear and indisputable a case as would have

justified the court in giving a peremptory instruction for a verdict in his favor, its refusal to so direct was not error.—*Kroeger v. Passmore*, 504.

False Imprisonment—Justification.

44. An instruction requested by defendant, in an action for false imprisonment, to the effect that the law gives a private person the right to arrest another when the party arrested has committed, or is about to commit, a public offense in the presence of the party arresting (Pen. Code, sec. 1633), and that if the jury believed that plaintiff had taken from defendant property of the latter which he was attempting to recover at the time of the alleged imprisonment, verdict should be for defendant, was properly denied, since it failed to call the attention of the jury to the further fact that, in order to justify the imprisonment, the person arresting must have taken the one arrested before a magistrate without unnecessary delay, or delivered him to a police officer (Pen. Code, sec. 1643).—*Kroeger v. Passmore*, 504.

Criminal Law—Reasonable Doubt.

45. An instruction defining the term "reasonable doubt" in the language employed for that purpose in *Territory v. McAndrews*, 3 Mont., at page 162, and there approved and since accepted as a proper definition of those words, is not open to the objection that by it the jury were confined to a consideration of the evidence, whereas a reasonable doubt might arise from the lack of evidence.—*State v. De Lea*, 531.

Same—Credibility of Defendant.

46. While it is the general rule that a court ought not in its instructions single out a particular witness and direct the attention of the jury to his testimony, section 2442, Penal Code, makes an exception to this rule, and the court may properly instruct that the jury, in judging the credibility of one on trial for a crime and the weight to be given to his testimony, may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he stands charged.—*State v. De Lea*, 531.

Same—Larceny—Definition—Curing Error.

47. The defect in an instruction which incorrectly defined "larceny" was cured by a subsequent one, which, though not technically correct, was not open to the objection urged against it by appellant.—*State v. De Lea*, 531.

Review.

48. In reviewing instructions they must be considered as a whole.—*State v. De Lea*, 531.

Railroads—Negligent Killing.

49. The giving of an instruction, in an action to recover damages from a railway company for the negligent killing of a pedestrian while crossing its tracks, substantially consisting of a statement of the pleadings, was not reversible error.—*Riley v. Northern Pac. Ry. Co.*, 545.

Railroads—Injuries at Crossings.

50. In an action for damages for the death of one struck by an engine while crossing defendant's tracks, there was evidence for defendant that the bell was ringing and a headlight burning. Plaintiff's witnesses testified that they did not hear any bell or see any light. Defendant's witnesses swore that they did not see the deceased at all, although the engineer claimed he was looking toward the very spot where the accident happened. *Held*, that the court properly refused to charge that it was proved by the uncontradicted evidence that the bell was ringing and the headlight burning, that the ringing and the light were a sufficient warning, and that, if no other negligence was

shown, the verdict must be for defendant.—*Riley v. Northern Pac. Ry. Co.*, 545.

Same.

51. The court in the case above referred to having distinctly instructed the jury to limit their consideration to acts of negligence proven by the evidence, it was not prejudicial error to refuse to charge, relative to an allegation in the complaint that the speed of the engine exceeded a certain limit—a fact unproven—that the evidence uncontradictedly showed that the speed of the engine was less than the prescribed limit, and that this question should not be considered, but that, if no other negligence appeared, verdict should be for defendant.—*Riley v. Northern Pac. Ry. Co.*, 545.

Same—Ordinances.

52. The absence of a city ordinance requiring a railway company to provide a flagman at a crossing is not conclusive upon the question whether or not the company was negligent in failing to provide one of its own accord; it was, therefore, not error to refuse to charge in the action above set forth that an ordinance, alleged in the complaint to have been violated, had no reference to the crossing at which plaintiff's intestate was killed.—*Riley v. Northern Pac. Ry. Co.*, 545.

Same—Refusal.

53. Nor was it error to refuse to instruct the jury in the above action that, in determining whether a reasonable person could have seen the approaching engine, the jury could take into consideration what other persons coming after decedent saw in this regard. This was proper matter for argument to the jury and not for an instruction to them.—*Riley v. Northern Pac. Ry. Co.*, 545.

Same—Applicability to Evidence.

54. Where, in an action against a railway company for the negligent killing of a person, it was not shown that decedent had assumed a position of known danger, or that the place where he was killed was not, apparently, a place of safety, the court correctly refused to charge that in thus failing to exercise ordinary care or reasonable prudence he was guilty of contributory negligence, and defendant company would not be liable, where in other instructions the question of contributory negligence had been fully covered; the requested charge was properly refused, also, for failing to refer to the duty of the defendant to exercise ordinary care to protect the deceased in the position in which he found himself.—*Riley v. Northern Pac. Ry. Co.*, 545.

Same—Refusal.

55. In an action for the death of one struck by an engine while crossing defendant's tracks and attempting to get out of the way of a coming passenger train, there was no error in refusing to charge that in any event, if the deceased was at fault in putting himself in a position where a movement to avoid the dust of the passenger train would bring him within striking distance of the switch-engine, there could be no recovery on the ground of the speed of the passenger train, since the instruction omitted the element of defendant's duty to take reasonable care to avoid injuring the deceased in the position in which he placed himself.—*Riley v. Northern Pac. Ry. Co.*, 545.

Same.

56. Error was not committed in refusing to instruct the jury in the case mentioned above, that there was nothing in the evidence showing traffic conditions, at the crossing where the accident occurred between the early hours in the morning when deceased was killed, requiring the operation of crossing gates independently of any ordinance or regulation; the giving of this instruction would have withdrawn from

the jury the question at issue, whether defendant exercised ordinary care in moving its engine across the street under all the circumstances disclosed.—*Riley v. Northern Pac. Ry. Co.*, 545.

Negligence—Contributory Negligence—Last Clear Chance—Argument—Issues.

57. Where all the testimony in the above case relating to the last clear chance to avoid the injury went in without objection under the issues made by the complaint and answer, the doctrine of the last clear chance was a legitimate subject for argument to the jury and of instruction by the court, though no such issue was raised by the reply to the plea of contributory negligence.—*Riley v. Northern Pac. Ry. Co.*, 545.

INSURANCE.

Fraternal Societies—What Constitutes Contract.

1. The certificate issued by a fraternal insurance order, together with the provisions of its constitution and by-laws, constitute the contract of insurance between it and one of its members.—*Kennedy v. The Grand Fraternity*, 325.

Same—Nonpayment of Dues—Forfeiture.

2. It is competent for a fraternal insurance society to make a contract of life insurance with one of its members, containing a provision, among others, that failure to make payment of dues within the time allowed for making payment, shall work a forfeiture of his certificate, without notice to or demand upon the insured.—*Kennedy v. The Grand Fraternity*, 325.

Same—Payment of Dues—Time—Essence of Contract.

3. Where a certificate of insurance of the character of the one above referred to provides that it shall be void if payment of dues or premium is not made at a specified time, time is of the essence of the contract, and failure to make payment on or before such time works an absolute forfeiture.—*Kennedy v. The Grand Fraternity*, 325.

Same—Delinquency—Reinstatement—Burden of Proof.

4. Where one, insured under a contract with a fraternal insurance order, had become delinquent by failure to pay his dues and premium at a specified time, and, upon insured's death, his beneficiary relied for recovery upon a condition subsequent, to-wit, decedent's reinstatement prior to his death, which was denied in the answer—she assumed the burden of proof upon that issue.—*Kennedy v. The Grand Fraternity*, 325.

Same—Delinquency—Reinstatement—Requisites.

5. The provisions of the constitution and by-laws of a fraternal insurance society, relative to the method to be pursued by a delinquent member to bring about his reinstatement, must be construed together; hence, a literal compliance with one provision, which required the filing of a proper application with, and payment of the dues and assessments in arrears to, the collector of a local lodge, did not alone work a reinstatement, where it was also made incumbent upon the applicant, by a subsequent provision, to furnish proof of his then good health, and where thereupon his reinstatement depended upon the approval of the application by the secretary of the grand body.—*Kennedy v. The Grand Fraternity*, 325.

Same—Delinquency—Reinstatement—Discretion.

6. If, in passing upon an application for reinstatement to membership in a society of the kind referred to above, the officer of the grand body to whom proof of the applicant's good health must be submitted, in the exercise of the discretion lodged in him decides adversely to

the applicant, the latter cannot complain.—Kennedy v. The Grand Fraternity, 325.

Same—Delinquency—Reinstatement—Proof.

7. The constitution and by-laws of a fraternal insurance society provided, among other things, that the "secretary" of the grand body should pass upon applications for reinstatement of delinquent members. The officer performing the duties of secretary for a local branch was styled "collector." A member, delinquent for two months, paid all dues in arrears and also those for a current month, to the collector of the subordinate lodge. The insured died while his application for reinstatement was pending. *Held*, that, since the officer whose duty it was to pass upon such applications was the "secretary" of the grand body, and not the person who acted as such officer for the local branch, a reinstatement was not the result of a remark, claimed to have been made by the collector when accepting payment of the dues, that the delinquent was again in good standing.—Kennedy v. The Grand Fraternity, 325.

Same—Delinquency—Reinstatement—Evidence—Insufficiency.

8. Evidence reviewed in the cause mentioned in the foregoing paragraphs, and *held* to be insufficient to show a reinstatement of the delinquent member prior to his death.—Kennedy v. The Grand Fraternity, 325.

Same—Delinquency—Waiver.

9. Where the delinquency of a member in a fraternal insurance society, operated *ipso facto* to terminate his membership and to abrogate his contract of insurance, and he knew that the secretary of the grand lodge only was vested with the authority to pass upon his application for reinstatement, and there was nothing further that he could do toward his reinstatement, he could not have been misled to his prejudice by anything said or done by the collector of the local branch of the society when accepting payment of dues in arrears and those not yet due, into the belief that the society had waived its right to declare a forfeiture of his certificate upon nonpayment at a specified time, and the doctrine of waiver was, therefore, not applicable.—Kennedy v. The Grand Fraternity, 325.

Same—Delinquency—Estoppel in Pais.

10. Where the record in the above action did not show that either the insured or his beneficiary was misled to his or her prejudice by the silence of the insurer when in equity and good conscience it ought to have spoken, or by some affirmative act or conduct on its part, in the matter of the insured's delinquency or reinstatement, the doctrine of estoppel in pais was inapplicable.—Kennedy v. The Grand Fraternity, 325.

Same—Delinquency—Reinstatement—Evidence of Good Health—Discretion.

11. The officer in whom was lodged the authority to pass upon applications for reinstatement of delinquents to membership in a fraternal insurance order, may not be said to have abused the discretion vested in him by the constitution and by-laws of the society, in rejecting an applicant who, according to the evidence, had, about two months prior to his application for reinstatement, been confined to his bed by pneumonia for three weeks, a disease shown to be often accompanied by serious lung troubles.—Kennedy v. The Grand Fraternity, 325.

Same—Delinquency—Reception of Current Dues—Reinstatement—Unauthorized Act of Agent—Ratification.

12. The defendant insurance society mentioned in the foregoing paragraphs had never intentionally conferred authority upon its

local collector to waive delinquency or to receive current dues, after delinquency, nor did the collector believe that he had such authority. The delinquent knew that only the secretary of the grand body could reinstate him. The dues, both delinquent and current paid to the collector were never forwarded to the central body but retained by him subject to the approval of the application for reinstatement. Immediately upon receipt of the application it was rejected and the collector directed to tender back the amount paid. *Held*, that a ratification by the society of the unauthorized act of its local collector had not been shown, and that therefore the insurer was not estopped to claim a forfeiture.—*Kennedy v. The Grand Fraternity*, 325.

Life—Agents—Ostensible Authority—Constructive Notice—Fraud—Negligence.

13. Plaintiff, a foreigner unable to read the English language well, was induced by one C., as agent for a life insurance company, to sign a note as payment of the first premium on a policy in C.'s company. He was rejected and without knowledge of his rejection was later induced by C. to sign a new note, payable to C. and one S., for a policy in a different company, C. falsely introducing S. to plaintiff as the agent of that company, and handing to plaintiff for signature an application blank which he had obtained from the local agency director of the latter company, for the alleged purpose of securing the application on a commission. Plaintiff made no inquiries as to why C. should assume to act for the latter company, and the only ostensible authority exhibited to him by C. was the application blank. Plaintiff in the presence of a number of others signed the note and application without endeavoring to ascertain their contents or requesting some one to read them to him. While the company represented by the agency director had knowledge of the fact that in some instances it was getting brokerage business, plaintiff had no knowledge of this. The company obtained no part of the proceeds of the note. In the receipt given to plaintiff no reference was made to the company. On rejection of his new application plaintiff brought suit to recover the amount of the second note. *Held*, that he was charged with constructive notice of the restriction upon C.'s authority, in the premises, and that he was guilty of such gross negligence as precluded him from recovering from the defendant company.—*Weidenaar v. New York Life Ins. Co.*, 592.

Same—Ratification.

14. The transaction referred to in the foregoing paragraph cannot be said to have been ratified by the defendant company, where neither it nor its agents had knowledge of it until long after the application had been rejected.—*Weidenaar v. New York Life Ins. Co.*, 592.

INTEREST.

Interpleader.

1. Allowance of interest on a sum of money, paid into court by a defendant upon application for interpleader, while in the hands of clerk awaiting judicial determination of the rightful owner, is error.—*Anderson v. Red Metal Min. Co.*, 312.

INTERPLEADER.

Justices' Courts—Effect on Action—Jurisdiction.

1. Where, in an action by an assignee on an account, a justice of the peace permitted the defendant to pay into court the amount sued for, and thereupon substituted as defendants the assignor and one other who claimed to be entitled to the money, the order of substitu-

tion did not convert the purely legal cause of action into an equitable one so as to deprive the justice of jurisdiction of the action, since section 588, Code of Civil Procedure, providing for interpleader, covers the subject both at law and in equity.—*Anderson v. Red Metal Min. Co.*, 312.

Irregularity—Waiver.

2. Section 588, Code of Civil Procedure, provides, *inter alia*, that a party against whom an action upon a contract, etc., is pending, may, before answer, upon affidavit ask that another person claiming an interest in the subject matter of the action, be substituted in his place, etc. An application for such a substitution was made on an amended answer. The party substituted became defendant without objection. *Held*, that the irregularity in the mode of substitution was waived by defendant.—*Anderson v. Red Metal Min. Co.*, 312.

Payment into Court—Presumptions.

3. Where the defendant in an action on an account had paid the sum in litigation into court and asked that another be substituted in his place and the plaintiff and such defendant be required to adjudicate their respective claims to it, and the parties thereafter proceeded upon the assumption that such payment had actually been made, it will be presumed that the fact that the amount was in the hands of the clerk, had been ascertained by the court prior to adjudging it to belong to the party entitled thereto, and its judgment will not be reversed for lack of evidence in this respect.—*Anderson v. Red Metal Min. Co.*, 312.

Judgment—Interest.

4. Allowance of interest on a sum of money, paid into court by a defendant upon application for interpleader, while in the hands of clerk awaiting judicial determination of the rightful owner, is error.—*Anderson v. Red Metal Min. Co.*, 312.

INTERSTATE COMMERCE.

See Railroads, 16, 17.

JUDGMENT-ROLL.

See Appeal and Error, 4.

JUDGMENTS.

See, also, Creditors; Deficiency Judgment.

Motion to Set Aside—Mistake, etc.—Discretion—Review.

1. A motion to set aside a judgment on the ground of mistake, surprise or excusable neglect, being addressed to the discretion of the court, an order refusing such a motion will not be reversed on appeal, where no complaint is made that such discretion had been abused in passing upon the affidavits filed in support of the motion and those against it, and where no reference is made in appellant's brief to them, the errors relied on being such as were not reviewable on an appeal from an order of this kind.—*Ferguson v. Parrott*, 252.

Equity—Decrees.

2. Decrees in equity are judgments within the definition of section 1000, Code of Civil Procedure, and are, so far as they award a recovery of money, in nowise different from judgments at law.—*Raymond v. Blancgrass*, 449.

Same—Decrees—Liens.

3. When properly docketed, a decree in equity becomes a lien upon the real estate of the debtor.—*Raymond v. Blancgrass*, 449.

Same—Decrees—How Enforced.

4. A decree in equity directing the payment of money may be enforced by execution in the same manner as a judgment in an action at law.—*Raymond v. Blancgrass*, 449.

Foreclosure—Default—Stipulation—Extent of Relief.

5. Where, in a foreclosure suit, the principal defendants entered into a stipulation with plaintiff that they had no defense, would file no answer, and that judgment might be entered against them in accordance with the prayer of the complaint, it was error for the court to direct in its decree not only the sale of the property and the application of the proceeds to the satisfaction of the mortgages, but also the application of the surplus to the satisfaction of judgments set up in plaintiff's replication to the answer of another defendant, holding liens on the property, since, under section 1003, Code of Civil Procedure, and under the stipulation the decree should have been entered according to the prayer of the complaint.—*Manuel v. Turner*, 512.

Pleadings to Sustain—Reply.

6. A judgment for plaintiff for affirmative relief cannot be based upon allegations which appear in the reply only.—*Manuel v. Turner*, 512.

Dower—Judgment Against Husband—Effect.

7. The lien of a judgment against a husband is subject to the interest of his wife, whether arising from a tenancy in common with her husband or out of her right of dower.—*Manuel v. Turner*, 512.

JUDICIAL NOTICE.

Personal Injuries—Mortality Tables.

1. In personal injury cases the district court takes judicial notice of standard mortality tables, offered for the purpose of showing the probable expectancy of plaintiff's life, and, if it is satisfied that the one offered is of that character, no further identification is necessary, and it may be read to the jury by an attorney not sworn as a witness in the case.—*Stephens v. Elliott*, 92.

JURISDICTION.

Pleadings—Complaint—Appeal.

1. The objection that a complaint fails to allege a jurisdictional fact may be raised for the first time on appeal.—*Rumping v. Rumping*, 39.

Justices of the Peace.

2. Justices' courts are of limited jurisdiction, having only such powers as are conferred upon them by statute.—*State ex rel. Collier v. Houston*, 178.

Criminal Law—Information—Insufficiency—Habeas Corpus.

3. If an information is not merely defective, but states facts which do not constitute any crime known to the law, or undertakes to state such an offense but the facts do not constitute it, and no addition to them, however full and complete, can supply what is essential, the court is without jurisdiction to put the defendant on trial, and, if convicted, he is entitled to his release on *habeas corpus*, even though he might secure the same relief on appeal.—*In re Farrell*, 254.

Appeal—Irregularities—Waiver.

4. By specifically waiving all previous irregularities and informalities, when appearing before a justice of the peace in a criminal cause which

had been transferred from a police court, and of which both the justice and magistrate had jurisdiction, and submitting to trial without objection, defendant was precluded from thereafter attacking the resulting judgment on the ground that by reason of the failure of the police judge to transmit a copy of his docket to the justice of the peace, the latter did not acquire jurisdiction to try the cause.—In re Graye, 394.

Waiver.

5. The rule that if a court has jurisdiction of the subject matter of an action, a general appearance of the defendant to the merits, without objection, is a waiver of all personal privilege in respect of the particular court in which the action is brought, applies to courts of limited as well as of general jurisdiction.—In re Graye, 394.

Justices of the Peace—Criminal Law—Appeal—District Courts.

6. Since the district court on an appeal from a justice's court does not sit as a court of review to correct errors, but is required to try the cause *de novo* upon the merits, the fact that the justice may have lost jurisdiction by trying a criminal case in part on a legal holiday, and in thereafter taking it under advisement instead of entering judgment at the close of the trial, all without objection by defendant, did not deprive the district court of jurisdiction. The justice having had jurisdiction of the subject matter and of the defendant, the appeal clothed the district court with power to proceed, no matter what irregularities may have attended the trial in the lower court.—In re Graye, 394.

JURY.

Viewing Premises—Discretion.

1. Where, in a personal injury suit, drawings of the machinery, the faulty condition of which plaintiff alleged as the cause of his injury, had been presented to the jury for inspection, and, upon inquiry by the court, the jurors all stated that they understood the situation, the court acted within its discretion when it refused to direct a view of the machinery itself, at a mine a considerable distance from the place of trial.—Stephens v. Elliott, 92.

Water Rights—Ditches—View by—Findings—Evidence—Insufficiency—New Trial.

2. The fact that in a water right suit, in which one of the principal questions at issue was the capacity of a ditch as of the date of appropriation—three years and seven months prior to the date of the trial—the jurors were permitted to view the premises, was no ground for the denial of a motion for a new trial, based upon the insufficiency of the evidence to sustain a finding upon the question, where it appeared that in the interim between the date of appropriation and the time of trial the ditch had become greatly out of repair, so that the view had by the jury could not have been of much, if any, assistance to them in determining its capacity at the date of appropriation.—White v. Barling, 413.

JUSTICES OF THE PEACE.

Appeal—Counterclaims—Nonsuit.

1. Where defendant in an action before a justice of the peace failed to set up a then subsisting counterclaim upon which an action might have been brought in that court, he could not, under sections 1524 and 1525 of the Code of Civil Procedure, thereafter on appeal to the district court have it adjudicated, and a motion for nonsuit on the ground that by his failure he was barred from securing any relief was properly sustained.—Walter v. Cox, 20.

Jurisdiction.

2. Justices' courts are of limited jurisdiction, having only such powers as are conferred upon them by statute.—*State ex rel. Collier v. Houston*, 178.

Statutes—Procedure.

3. In the exercise of the powers granted to justices of the peace, they must pursue the statute, not only as to the classes of cases which they may hear and determine, but as to the procedure prescribed.—*State ex rel. Collier v. Houston*, 178.

Judgment—Postponement of Rendition—Effect.

4. Where a justice of the peace, after submission of a cause to him for determination, took it under advisement, without the consent of the parties, appointing neither time nor place for the rendition of judgment, he lost jurisdiction, and the judgment, rendered about a month thereafter, without notice to the parties, was void. (*Code Civ. Proc.*, sec. 1623).—*State ex rel. Collier v. Houston*, 178.

Taking Case Under Advisement—When Permissible.

5. *Obiter*: While a justice of the peace may, with the consent of the parties, take a case under advisement, the adjournment of the trial, so brought about by stipulation, must be to a time and place appointed for that purpose, and an order to that effect entered upon his docket.—*State ex rel. Collier v. Houston*, 178.

Equity—Jurisdiction—Appeal—District Courts.

6. Merely because plaintiff, in an action before a justice of the peace, assumed by the recitals in his complaint to secure the cancellation of an alleged forged assignment, and also a judgment on a contract for the payment of money, whereas the justice had not jurisdiction to grant the equitable relief asked, was no reason why his appeal to the district court should have been dismissed for lack of jurisdiction to entertain it, where, after eliminating the equity feature of the complaint (a demurrer to which, interposed by one of the defendants, had been sustained by the justice), it still stated a cause of action of which the justice had jurisdiction; and, hence, the district court had power to proceed.—*Anderson v. Red Metal Min. Co.*, 312.

Same—Interpleader—Effect on Action—Jurisdiction.

7. Where, in an action by an assignee on an account, a justice of the peace permitted the defendant to pay into court the amount sued for, and thereupon substituted as defendants the assignor, and one other who claimed to be entitled to the money, the order of substitution did not convert the purely legal cause of action into an equitable one so as to deprive the justice of jurisdiction of the action, since section 588, *Code of Civil Procedure*, providing for interpleader, covers the subject both at law and in equity.—*Anderson v. Red Metal Min. Co.*, 312.

Criminal Law—Appeal—Record.

8. In the absence of specific statutory provision on the subject, the original files, together with a copy of the docket minutes, held, to constitute the record on appeal, in a criminal cause, from a justice of the peace to the district court.—*In re Graye*, 394.

Same—Appeal—Irregularities—Waiver—Jurisdiction.

9. By specifically waiving all previous irregularities and informalities, when appearing before a justice of the peace in a criminal cause which had been transferred from a police court and of which both the justice and magistrate had jurisdiction, and submitting to trial without objection, defendant was precluded from thereafter attacking the resulting judgment on the ground that by reason of the failure of the

police judge to transmit a copy of his docket to the justice of the peace, the latter did not acquire jurisdiction to try the cause.—In re Graye, 394.

Jurisdiction—Waiver.

10. The rule that if a court has jurisdiction of the subject matter of an action, a general appearance of the defendant to the merits, without objection, is a waiver of all personal privilege in respect of the particular court in which the action is brought, applies to courts of limited as well as of general jurisdiction.—In re Graye, 394.

Criminal Law—Appeal—Jurisdiction—District Courts.

11. Since the district court on an appeal from a justice's court does not sit as a court of review to correct errors, but is required to try the cause *de novo* upon the merits, the fact that the justice may have lost jurisdiction by trying a criminal case in part on a legal holiday, and in thereafter taking it under advisement instead of entering judgment at the close of the trial, all without objection by defendant, did not deprive the district court of jurisdiction. The justice having had jurisdiction of the subject matter and of the defendant, the appeal clothed the district court with power to proceed, no matter what irregularities may have attended the trial in the lower court.—In re Graye, 394.

JUSTIFICATION.

See False Imprisonment, 6, 8, 9.

LABOR.

Hours of,—see Railroads, 16, 17.

LACHES.

See Equity, 2-4.

LARCENY.

See Criminal Law, 1, 2, 16-21, 74.

LAST CLEAR CHANCE.

Doctrine of,—see Personal Injuries, 42.

LAW OF THE CASE.

Retrial—Nonsuit.

1. Where, on the retrial of a cause, the judgment in which had been reversed on a former appeal for the reason that the instrument declared upon and on which recovery was had was without consideration, no new or additional evidence on the subject of consideration had been adduced, nonsuit was proper. The former decision constituted the law of the case.—*Easterly v. Jackson*, 205.

LEGAL HOLIDAYS.

See Jurisdiction, 6.

LEGISLATURE.

See, also, Statutes and Statutory Construction.

Constitution—Power of.

1. The state Constitution being a limitation upon, and not a grant of, legislative power, such power is supreme, in the absence of a

specific prohibition in that instrument or the use of words which imply a prohibition.—*Evers v. Hudson*, 135.

Corporations—Power of, to Destroy.

2. *Obiter*: Under the right reserved to the state by sections 2 and 3, Article XV of the Constitution, the legislature may not only alter corporate charters, but, if deemed expedient, may destroy the corporate body.—*Lewis v. Northern Pac. Ry. Co.*, 207.

Statutes—Adopted from Other States After Construction—Effect.

3. The legislature, by adopting statutes from another state after the same had been construed by its courts, adopts also the interpretation thus placed upon them.—*McQueeney v. Toomey*, 282.

LIENS.

See, also, Execution, 1; Judgments, 6.

Chattel Mortgages—Title.

1. A chattel mortgage creates a lien only, and, therefore, does not pass title from the mortgagor to the mortgagee.—*Demers v. Graham*, 402.

Equity—Decrees.

2. When properly docketed, a decree in equity becomes a lien upon the real estate of the debtor.—*Raymond v. Blancgrass*, 449.

LIFE INSURANCE.

See Insurance.

LIVESTOCK.

See Mortgages.

MANDAMUS.

Criminal Law—Appeal—Record—Clerk of District Court.

1. *Held*, on application for writ of mandate, that the clerk of the district court must, as soon as a notice of appeal in a criminal cause is filed with him, proceed to prepare a copy of the record and other papers enumerated in section 2281, Penal Code, and transmit same within ten days from the date of the notice, or, in case there be a bill of exceptions to be settled, then within ten days of the date of settlement, to the clerk of the supreme court without charge to appellant, and that a praecipe enumerating the papers constituting such technical record need not be lodged with the clerk.—*State ex rel. Connors v. Foster*, 278.

Appeal—Moot Questions.

2. An appeal from an order granting a writ of *mandamus* to compel the transfer of a cause, the complaint in which charged the violation of a city ordinance, from a police to a justice of the peace court, will be dismissed, where it appears that the mandate of the district court had been fully complied with on the day the appeal was taken, and that the only purpose sought by it was a decision upon a moot question relative to jurisdiction.—*State ex rel. Brass v. Horn*, 418.

Appeal—Stay—Supersedes.

3. Even if a stay, in a case where a writ of mandate is issued by the district court to compel the transfer of a cause from a police to a justice of the peace court, is not provided for in the Code of Civil Procedure (a question not decided), still the supreme court has power,

under section 3, Article VIII of the Constitution, to issue a *superedeas*, or any other appropriate writ, to effectuate its appellate jurisdiction, and thus to insure to the aggrieved party an appeal which might otherwise be of no value.—*State ex rel. Brass v. Horn*, 418.

MASTER AND SERVANT.

See, also, Personal Injuries.

Negligence of Fellow-servants—Master's Liability.

1. In the absence of a statute to the contrary, a master is not liable to one servant for injury caused by the negligence of another servant in the same common employment, unless the negligent servant was the master's representative, or the master was negligent in employing or retaining him.—*McIntosh v. Jones*, 467.

Servant's Single Act of Negligence—Liability of Master.

2. A servant's single act of negligence, committed after the hiring and without the master's knowledge, is not sufficient to charge the latter with lack of ordinary care in selecting the former as his employee.—*McIntosh v. Jones*, 467.

Same.

3. The single, exceptional act of a servant in releasing his hold on a piano while helping to move it, when he should not have done so, did not prove him to be incompetent for that class of work.—*McIntosh v. Jones*, 467.

Selection of Fellow-servants—Duty of Master.

4. Upon a transfer company rested the duty of exercising ordinary care in the selection of a helper to assist one of its employees in moving a piano.—*McIntosh v. Jones*, 467.

Same.

5. An employee of a transfer company was not entitled to recover damages from his employer for injuries alleged to have been sustained by reason of defendant's failure to exercise ordinary care in selecting a reasonably competent fellow-servant to assist plaintiff in moving a piano, where it appeared that all that was required of the helper was strength and ordinary intelligence, which he possessed, and that plaintiff was injured by the assistant releasing his hold on the piano contrary to plaintiff's orders.—*McIntosh v. Jones*, 467.

MECHANICS' LIENS.

Joinder of Causes—On Contract—*Quantum Meruit*—When Permissible.

1. Where plaintiff in a suit to foreclose a mechanic's lien joined a count on an express contract for the construction of a cistern with a count on a *quantum meruit*, the averments of each not having been so inconsistent as to be contradictory, and where the defendant was not misled to his prejudice, a demurrer on the ground of ambiguity and uncertainty was properly overruled.—*Neuman v. Grant*, 77.

Verified Account—Sufficiency.

2. A verified account attached to a mechanic's lien statement, reciting a charge for excavating a cistern, \$8, mason's helper, \$6, drayage, 50 cents, cement, \$8.75, lime, \$5, sand, \$1.50, brick, \$20, mason's work and contractor's services, \$20.25, total, \$70, constituted a substantial compliance with Code of Civil Procedure, section 2131, as amended by Laws of 1901, page 162, requiring the filing with the county clerk of a just and true account of the amount due after allowing all credits, etc.—*Neuman v. Grant*, 77.

Costs—Improper Allowance.

3. Under section 1863 of the Code of Civil Procedure, prescribing the costs allowable in a suit to foreclose a mechanic's lien, it was error to allow items charged for preparation and verification of the lien and for abstract of title to the property covered by the lien.—*Neuman v. Grant*, 77.

MINES AND MINING.

See, also, **Personal Injuries**, 4-24.

Deeds—Effect—Identification of Property.

1. Under Civil Code, sections 1511 and 1512, a deed purporting to transfer a portion of a lode claim (naming it), located for the purpose of protecting a placer claim from possible adverse claimants prior to procurement of patent for the latter, conveyed such portion of the afterward patented placer claim, lying within the exterior boundaries of the lode claim, as could be identified; and it was immaterial whether the lode claim was a valid one as against others or not.—*Collins v. McKay*, 123.

Conveyances—Identification—Name.

2. If a portion of a mining claim can be identified as that intended to be conveyed, it is immaterial by what name the claim itself was designated in the deed.—*Collins v. McKay*, 123.

Quieting Title—Uncertainty in Description—Declarations.

3. In a suit by an administrator to quiet title to mining property, claimed by defendants under deeds of grant from plaintiff's intestate, for alleged uncertainty of description, declarations of defendant's grantor relative to the title conveyed and the location of the portions transferred, were admissible against the administrator.—*Collins v. McKay*, 123.

Lost Monuments—Parol Evidence.

4. Where monuments or marks called for in a deed are lost or otherwise uncertain, their location may be proved by parol evidence.—*Collins v. McKay*, 123.

MISTAKE.

See **Discretion**, 8.

MOOT QUESTIONS.

See **Appeal and Error**, 26.

MORTALITY TABLES.

See **Personal Injuries**, 12.

MORTGAGES.

See, also, **Bankruptcy**.

Chattel—Description—Identification—Conversion.

1. The description of a band of sheep, in a mortgage, was "1,000 head of sheep on the range on Medicine Lodge creek, in Fremont county, Idaho, together with the wool and increase." The sheep were thereafter purchased from the mortgagor and incorporated in the buyer's band. The mortgagee thereafter, under foreclosure proceedings had the sheep, alleged to have been mortgaged, seized and sold. In an action in conversion the defendant offered the above mortgage in evidence, together with the proceedings had by the

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sheriff. This evidence was excluded. *Held*, that in excluding the evidence the court acted properly, the description in the mortgage being wholly insufficient to identify the subject thereof, and that, therefore, no additional evidence in this respect having been offered, defendant had failed to connect himself with the mortgagor's title, and in seizing them, occupied the position of a naked trespasser.—*Massachusetts Sheep Co. v. Humble*, 201.

Chattel—Liens—Title.

2. A chattel mortgage creates a lien only, and, therefore, does not pass title from the mortgagor to the mortgagee.—*Demers v. Graham*, 402.

Chattel—Domestic Animals—Increase—Ownership.

3. A chattel mortgage upon cows, in which no mention was made of their increase, did not cover their calves, in gestation at the time of the execution of the mortgage but born prior to foreclosure.—*Demers v. Graham*, 402.

Foreclosure—Default—Stipulation—Extent of Relief.

4. Where, in a foreclosure suit, the principal defendants entered into a stipulation with plaintiff that they had no defense, would file no answer, and that judgment might be entered against them in accordance with the prayer of the complaint, it was error for the court to direct in its decree not only the sale of the property and the application of the proceeds to the satisfaction of the mortgages, but also the application of the surplus to the satisfaction of judgments set up in plaintiff's replication to the answer of another defendant, holding liens on the property, since under section 1003, Code of Civil Procedure, and under the stipulation the decree should have been entered according to the prayer of the complaint.—*Manuel v. Turner*, 512.

Foreclosure—Complaint—Adjustment of Equities.

5. Where the complaint in a mortgage foreclosure suit stated that defendants other than the mortgagors had or claimed interests in or liens on the premises, as judgment or attaching creditors, but that their interests or liens were subordinate to plaintiff's mortgage, and demanded that the priority of the mortgage lien be fixed and established, and that the liens of such other defendants be declared inferior to it, the court properly adjusted these equities in the decree.—*Manuel v. Turner*, 512.

MUNICIPAL CORPORATIONS.

See, also, Highways.

Cities and Towns—Improvement Districts—Rights of Objectors.

1. Under the provisions of section 31 of the Act of 1907 (Sess. Laws 1907, p. 219), owners, or agents of owners, of more than one-half in area of all the property to be affected by a proposed improvement district, have the absolute right to appear before the city or town council at the time and place mentioned in the resolution looking to the creation of such district, and to be heard in protest, either orally or in writing; whereupon the contemplated improvement cannot then be made, even though the objectors assign no reason for their action.—*Hensley v. City of Butte*, 32.

Same—City Council—Powers.

2. Owners, or agents of owners, representing fifty per cent or less of all the property affected by a proposed improvement district in a city or town, may, under section 31 of the Act of 1907 (Sess. Laws 1907, p. 219), appear before the council and show cause why the improvement should not be made, it being optional, however, with that body

to act favorably or otherwise on such remonstrance.—*Hensley v. City of Butte*, 32.

Same—Improvements—Objections—Personal Appearance—City Clerk.

3. *Held*, that the Act of 1907 (Sess. Laws 1907, p. 219), makes it obligatory on owners of real property, or agents representing them, to appear personally, by agent or counsel, before the city or town council for the purpose of objecting to the creation of an improvement district, by presenting formal written objections, or by showing cause in any other suitable manner; that while it is not necessary that each protestant appear in person, each must be represented, although all may be represented by one person; and that protests left at the city clerk's office for presentation are of no avail.—*Hensley v. City of Butte*, 32.

Personal Injuries—Defective Sidewalks—Notice of Claim.

4. Where, in an action against a city for personal injuries, a notice of claim for damages, marked "filed" by the city clerk and bearing an indorsement that the claim had been referred to the judiciary committee of the council and disallowed, was received in evidence without objection, the requirements of Laws of 1903, page 166, relative to giving notice of such a claim, were shown to have been sufficiently complied with.—*O'Flynn v. City of Butte*, 493.

Same—Defects in Sidewalk—Latent—Patent.

5. The testimony, in an action against a city for damages for personal injuries sustained on account of a defective sidewalk, on the question whether a board in the walk was broken and the defect in it discernible to the eye or not, having been conflicting, and the jury having returned a verdict in favor of the plaintiff, it will be held that the defect was not latent, but could be seen.—*O'Flynn v. City of Butte*, 493.

Same—Defects in Walk—Imputed Knowledge.

6. *Held*, in the above action, where actual notice of the defective sidewalk on the part of the city had not been shown, that the court (under the evidence examined) properly submitted to the jury the question whether knowledge of the faulty condition of the walk could be imputed to the defendant.—*O'Flynn v. City of Butte*, 493.

Same—Evidence—Admissibility.

7. The daughter of plaintiff in the action above told a girl friend where her mother fell. The friend, as a witness in the cause, deposed to the fact that she fell at the same place, identifying it. There was also testimony that no broken boards, other than the one alleged to have been the cause of the injury, existed in the immediate vicinity. *Held*, that the admission in evidence of the daughter's statement that she told her friend where her mother claimed to have been hurt was not prejudicial error.—*O'Flynn v. City of Butte*, 493.

Same—Instructions—Presumptions.

8. An instruction that a person in the exercise of ordinary care, and without knowledge of any defects in, or the dangerous condition of, a sidewalk, might rely on the presumption that the sidewalk was in an ordinarily safe condition for travel, was not objectionable for failure to charge that, if the traveler had previous knowledge of the dangerous condition of the walk, the presumption did not apply. The rule laid down was correct, and if defendant relied upon plaintiff's knowledge as nullifying the effect of the presumption, it should have asked an instruction covering the point.—*O'Flynn v. City of Butte*, 493.

Same—Defective Walks—Notice—Instructions.

9. An instruction charging the jury that a city must have had either actual or constructive notice of the defective condition of a sidewalk for a sufficient length of time prior to the injury claimed to have been

sustained on account thereof, so as to enable it to repair the walk, was not objectionable as outside of the issues, where the complaint averred that the defendant carelessly and negligently permitted the walk to be and remain in a dangerous and unsafe condition for a long time prior to the date of the accident, and that this condition was "for a long time prior to the injury known to the defendant," thus sufficiently negating the idea that the defect was not known to defendant for a sufficient length of time to enable it to repair it.—O'Flynn v. City of Butte, 493.

Same—Evidence—Sufficiency.

10. Where, in an action for injuries caused by a defective sidewalk, a witness testified that she had fallen on the walk at the same place a week before, and that two days after plaintiff was injured the loose plank which constituted the defect was in the same condition as when witness fell, the proof was sufficient to go to the jury on the question whether the condition of the walk remained the same from the time the witness fell until plaintiff was injured.—O'Flynn v. City of Butte, 493.

NEGLIGENCE.

See Insurance, 13; Personal Injuries, 1, 29, 38, 45, 48, 49, 50.

NEGOTIABLE INSTRUMENTS.

Nonpayment—Burden of Proof—Instructions.

1. Instructions, given in an action on a promissory note, that if it appeared by a preponderance of the evidence that payment had not been made, plaintiff was entitled to recover, and that, on the contrary, if it appeared in the same way that payment had been made, the defendants were entitled to a verdict, were not objectionable as casting the burden of proving nonpayment upon plaintiff, or because of the absence of a statement as to what should be done in case of an equipoise in the evidence on the issue of payment, and could not have misled the jury where in other parts of the charge they had been told that the burden was upon defendants to establish payment by a preponderance of the evidence, and that plaintiff's possession of the note was to be considered by them as *prima facie* evidence that it had not been paid.—McCauley v. Darrow, 13.

Payment—Instructions—Limiting Effect of Evidence—Issues.

2. Where defendants in an action on a promissory note pleaded full payment by a conveyance of real property to plaintiff, made in pursuance of an agreement to that effect, and no issue had been made as to a partial payment, an instruction which limited the effect of evidence tending to show the value of the property so conveyed, to the reasonableness or unreasonableness of the agreement entered into relative to the transfer, and failed to state what should be done in case the jury found that such conveyance discharged a part of the note only, was not error.—McCauley v. Darrow, 13.

NEW TRIAL.

Conflicting Evidence—Discretion.

1. Where the evidence is conflicting, a motion for a new trial upon the ground of the insufficiency of the evidence to sustain the verdict, is addressed to the sound legal discretion of the trial court.—Stephens v. Elliott, 92.

Excessive Damages—When not Ground for.

2. Where an amount awarded by the jury for personal injuries, claimed by defendant to have been so excessive as to amount to an abuse of the discretion lodged in it, may have been the result of a miscalculation, or based upon a wrong standard, the award cannot be said to have been the result of passion or prejudice so as to entitle the defendant to a new trial under subsection 5 of section 1171 of the Code of Civil Procedure.—*Lewis v. Northern Pac. Ry. Co.*, 207.

Excessive Damages—Remission of Excess.

3. *Held*, that the district court, in an action for damages for personal injuries alleged to have been suffered by plaintiff, a brakeman on a railroad, through the loss of his left hand, was justified in granting a new trial conditioned upon the remission of \$7,400 from a verdict for \$17,400, and in thereafter, with plaintiff's consent, scaling it to \$10,000, and that such latter amount was not excessive in view of all the circumstances in the case.—*Lewis v. Northern Pac. Ry. Co.*, 207.

When Order Granting It will be Affirmed.

4. Where a motion for a new trial is based upon a number of grounds, and the court, in granting it, does not specify the particular one upon which it does so, its action will be approved on appeal if justified upon any one or more of the grounds of the motion.—*White v. Barling*, 413.

Findings—Evidence—Insufficiency—Discretion.

5. A motion for a new trial, on the ground that the findings are not supported by the evidence, is addressed to the sound legal discretion of the trial court, and its order will not be disturbed, except in a case of manifest abuse of such discretion.—*White v. Barling*, 413.

Findings—Evidence—Insufficiency.

6. Where the evidence in a water right suit did not preponderate in favor of a finding, attacked upon a motion for a new trial for insufficiency of the evidence to sustain it, but was conflicting and of such a character that different courts might reasonably have differed as to the weight of it, an order granting the new trial will be affirmed.—*White v. Barling*, 413.

Equity Cases—Findings—Modification.

7. A litigant, in an equity case, has the right to move for the modification of a finding, or ask for a new trial; hence, a trial court cannot dictate to the moving party to pursue the former method, so as to save the trouble and expense of a retrial.—*White v. Barling*, 413.

Water Rights—Ditches—View by Jury—Findings—Evidence—Insufficiency.

8. The fact that in a water right suit, in which one of the principal questions at issue was the capacity of a ditch as of the date of appropriation,—three years and seven months prior to the date of trial,—the jurors were permitted to view the premises, was no ground for the denial of a motion for a new trial, based upon the insufficiency of the evidence to sustain a finding upon the question, where it appeared that in the interim between the date of appropriation and the time of trial the ditch had become greatly out of repair, so that the view had by the jury could not have been of much, if any, assistance to them in determining its capacity at the date of appropriation.—*White v. Barling*, 413.

Practice—Motion—Affidavits—Filing—Time.

9. Section 1173, Code of Civil Procedure, allows ten days after notice of motion for a new trial in which to prepare, serve, and file the affidavits, statement, etc. A finding and decision having been filed August 30, 1905, a written stipulation was made on September 6th

that either party might have thirty days' "additional" time in which to give notice of intention to move for a new trial, and ninety days' "additional" time in which to prepare, serve, and file affidavits, bills of exception, or statements in support of the motion. Appellant gave notice of motion for a new trial October 7th, and all the affidavits were filed January 3, 1906. *Held*, that appellant was entitled to thirty days in addition to the four days of the ten-day period not yet expired when the stipulation was made, in which to serve notice of motion for a new trial, and that the ninety days stipulated for in which to file affidavits, bills of exception, or statements, etc., in support of the motion, began to run on the expiration of ten days after the service of notice, and hence that the affidavits were filed in time.—Hill v. McKay, 440.

Surprise—Showing Necessary.

10. A new trial, asked for on the ground of surprise, will be granted only when it is clearly shown that the movant was actually surprised, that the facts from which the surprise resulted were material, that the verdict or decision resulted mainly from these facts, that the alleged condition was not due to movant's inattention or neglect, that he acted promptly and claimed relief at the earliest opportunity, that he used every means reasonably available at the time of the surprise to remedy its effect, and that the result of a new trial will probably be different.—Hill v. McKay, 440.

Surprise—Affidavit—Insufficiency—Neglect.

11. Where, from an affidavit filed in support of a motion for a new trial on the ground of surprise, it appeared only by way of conclusion of affiant what inquiry he made, prior to trial, of two witnesses whose testimony constituted the alleged surprise, or what they told him they would testify to, and in the absence of a positive statement that the witnesses whose conduct was complained of were the only ones called to testify in affiant's behalf in aid of his contention as to a water right (the record on appeal not containing any of the evidence introduced at the trial), and where after trial many other witnesses were found who could furnish the desired evidence, *held*, that the application was properly refused, since from such showing the inference was permissible that movant was negligent in the search for evidence to sustain his contention.—Hill v. McKay, 440.

Surprise—Showing—Insufficiency—Diligence.

12. The showing made by the applicant for a new trial on the ground of surprise, referred to in the foregoing paragraph, was further insufficient, for want of prompt action and diligence on his part in an endeavor to avoid the result of the alleged surprise, where he failed to ask for a continuance, or neglected to call the attention of court and counsel to the matter, or ask for a reopening of the cause, which was tried by the court, without a jury, and held under advisement for almost three months before the decision was rendered.—Hill v. McKay, 440.

Surprise—Appeal—Record—Different Result.

13. Where, on appeal from an order denying a new trial, asked for on the ground of surprise, occasioned by the testimony of witnesses relied on by appellant to prove his contention, the evidence given at the trial is not incorporated in the record, the supreme court will not order a reversal, since, even conceding that the new witnesses would testify as stated in the movant's affidavit filed in support of the motion, it cannot say that the result reached at the trial would probably be different if a new one were granted.—Hill v. McKay, 440.

When Order Granting New Trial Affirmed.

14. If a party was entitled to a new trial upon any one of a number of grounds urged by him on motion for a new trial, the order granting it will be affirmed, though based upon a ground devoid of merit.—*Harrington v. Butte, Anaconda & Pac. Ry. Co.*, 478.

Joint Motion and Appeal—Effect.

15. Where two defendants jointly moved for a new trial, the question, raised by one, that the evidence was insufficient to sustain the verdict as against him, will not be considered on appeal.—*Parnell v. Davenport et al.*, 571.

NONAPPEALABLE ORDERS.

See Appeal and Error, 29, 30.

NONSUIT.

See, also, Counterclaims, 1; Principal and Agent, 2, 3.

Suits in Equity—Motion for Judgment—Inferences Drawn from Evidence—Findings—Review.

1. Plaintiff, upon motion by defendant for judgment, made at the close of plaintiff's case in an equity suit, is not entitled—as he would be on a motion for nonsuit in an action at law—to have every inference drawn in his favor from the evidence which may reasonably be drawn therefrom; but the whole of the evidence is submitted to the court for final judgment, and if it furnishes ground for different inferences, the finding of the court thereon will not be disturbed unless the evidence preponderates against it.—*Streicher v. Murray*, 45.

Personal Injuries—Master and Servant.

2. Where the evidence introduced by plaintiff, in an action for damages for personal injuries claimed to have been caused by the negligence of his employers, showed that the accident occurred while he was engaged as a laborer on the lower floor of a building in course of construction, by reason of two planks falling upon him from an upper story, but failed to disclose how they happened to fall—whether on account of the negligence of defendants in allowing them to be improperly piled, or by reason of the negligence of some fellow-servant in handling them, nonsuit was properly granted.—*McGowan v. Nelson*, 67.

When Properly Overruled.

3. A motion for nonsuit made in an action to recover damages for personal injuries by reason of the negligence of plaintiff's employer, was properly overruled, where a *prima facie* case had been made out by plaintiff.—*Stephens v. Elliott*, 92.

Law of the Case—Contracts—Consideration.

4. Where, on the retrial of a cause, the judgment in which had been reversed on a former appeal for the reason that the instrument declared upon and on which recovery was had was without consideration, no new or additional evidence on the subject of consideration had been adduced, nonsuit was proper. The former decision constituted the law of the case.—*Easterly v. Jackson*, 205.

False Imprisonment.

5. Evidence of plaintiff, in an action for false imprisonment, examined, and held to justify the refusal of a motion for nonsuit.—*Kroeger v. Passmore*, 504.

Specific Performance—Judicial Discretion.

6. The discretion with which the district court is vested in determining whether or not a contract should be specifically enforced is a sound

legal one; therefore, where the testimony of plaintiff in such a suit furnished no ground for different conclusions, but showed that plaintiff was entitled to the relief asked, no grounds for the exercise of judicial discretion existed, and the motion of defendant for a "nonsuit" should have been overruled.—*Stevens v. Trafton*, 520.

Equity Cases—"Nonsuit."

7. In equitable proceedings there can be, strictly speaking, no such thing as a motion for a nonsuit.—*Stevens v. Trafton*, 520.

Effect in Law Actions—Appeal.

8. The effect of granting a nonsuit in an action at law is to declare that the evidence is insufficient to warrant a verdict for plaintiff under any circumstances; hence the judgment should be reversed on appeal, if there was any evidence justifying a verdict for plaintiff.—*Stevens v. Trafton*, 520.

Specific Performance—Discretion—Appeal.

9. In an action for specific performance of a contract, if plaintiff is not entitled to relief as of right, then upon a motion for nonsuit at the close of plaintiff's testimony it is the trial court's duty to adjudicate the issues between the parties, and the court may exercise a legal discretion in giving or withholding relief; hence the effect of nonsuit would not be to determine that plaintiff was not entitled to relief in any view of the evidence, but that the court, in the exercise of its discretion, withheld relief in that particular case, and its action will not be disturbed on appeal unless there was an abuse of discretion.—*Stevens v. Trafton*, 520.

Same—Evidence—Review.

10. Evidence of plaintiff in a suit to enforce the specific performance of an oral agreement for the sale of a lot, reviewed, and *held* sufficient to entitle plaintiff to a decree, and that the court erred in granting a "nonsuit."—*Stevens v. Trafton*, 520.

Same.

11. The fact that plaintiff in the suit referred to in the foregoing paragraph produced two receipts, which by their recitals, "balance in six months" and "part payment on lot," injected the only element of uncertainty into plaintiff's case, did not warrant a court of equity in disregarding his positive testimony as to his full performance of the agreement and granting a "nonsuit," especially in view of the failure of counsel to ask plaintiff for an explanation in this regard.—*Stevens v. Trafton*, 520.

Same.

12. The court in passing upon the motion for "nonsuit" in the above case should have taken into consideration defendant's general denial which gave it no intimation of the nature of the defense relied upon, and which may have had concealed within it either a valid defense or an absolutely unconscionable one, and should, in view of plaintiff's positive testimony that he had fully performed his part of the agreement, have denied the motion.—*Stevens v. Trafton*, 520.

NOTICE.

See Adverse Party, 1, 2.

OFFER OF PROOF.

See Evidence, 24.

OFFICERS.

Limit of Powers.

1. The limit of the powers of a public officer, when acting in a ministerial capacity, is the statute conferring them, and such powers as are necessarily implied to effectuate those expressly conferred.—In re Farrell, 254.

Ministerial Duties—Statutes—Discretion.

2. Where the mode of performance of ministerial duties, expressly enjoined, is prescribed, no further power is implied, and the officer has no discretionary power with reference thereto, but must strictly pursue the statute.—In re Farrell, 254.

ORDER OF PROOF.

See Personal Injuries, 9.

ORDERS.

Appealability,—see Appeal and Error, 29, 30.

PARTNERSHIP.

Action for Wages—Complaint—Sufficiency.

1. In an action to recover wages due for services rendered to a partnership of which defendant was a member, an allegation that the partners upon winding up their affairs had an accounting, and as part consideration for same defendant agreed to pay plaintiff for the balance due him from the firm, while somewhat indefinite and uncertain, sufficiently stated a consideration for defendant's promise to pay plaintiff the money due him from the firm.—Carlson v. Barker, 486.

Appeal—Review—Harmless Error—Instructions.

2. In an action to recover wages due for services to a partnership of which defendant was a member, which it was alleged he agreed to pay upon a final settlement between the partners, an instruction that, unless defendant, at the time of making the promise, had funds of the partnership sufficient to pay the debt, there was no consideration for his promise, if erroneous, was harmless error, where the jury, by finding for plaintiff, must have found that defendant did have sufficient funds to pay the debt.—Carlson v. Barker, 486.

Liability of Partner.

3. *Quære*: Is a member of a partnership severally liable for services rendered to the partnership?—Carlson v. Barker, 486.

Statute of Frauds—Promise to Pay Debt of Another—Agreement by Partner to Pay Firm Debt—Consideration.

4. Section 3612, subdivision 3, of the Civil Code, provides that a promise to answer for the antecedent obligation of another need not be in writing, where the promise is made upon a consideration beneficial to the promisor. Upon the winding up of a copartnership of which defendant was a member, he retained certain partnership funds and agreed to pay plaintiff a debt due him for wages from the firm. *Held*, that defendant's promise was upon a consideration, beneficial to himself, under section 3612, and was valid, though not in writing.—Carlson v. Barker, 486.

PAYMENT.

See Negotiable Instruments, 1, 2.

PERSONAL INJURIES.

See, also, Railroads, 2-15.

Master and Servant—Evidence—Sufficiency—Nonsuit.

1. Where the evidence introduced by plaintiff, in an action for damages for personal injuries claimed to have been caused by the negligence of his employers, showed that the accident occurred, while he was engaged as a laborer on the lower floor of a building in course of construction, by reason of two planks falling upon him from an upper story, but failed to disclose how they happened to fall—whether on account of the negligence of defendants in allowing them to be improperly piled, or by reason of the negligence of some fellow-servant in handling them—nonsuit was properly granted.—*McGowan v. Nelson*, 67.

Same—Evidence—Failure to Call Witnesses—Presumptions.

2. The failure of plaintiff in the action set out in the foregoing paragraph to call as witnesses in his behalf several of his coemployees—presumably fellow-servants—who were present at the time and place of the injury, raised the presumption that their testimony would have been unfavorable to him.—*McGowan v. Nelson*, 67.

***Res Ipsa Loquitur*—When Doctrine will not Apply.**

3. The doctrine of *res ipsa loquitur* rests upon the presumption that, in view of the surrounding circumstances, the accident to plaintiff would not have happened if defendant had exercised ordinary care; therefore, where the evidence was silent as to the cause of the accident and the attendant circumstances left room for the conclusion that the injury complained of might have occurred by reason of the negligence of plaintiff's fellow-servants, the doctrine cannot be invoked.—*McGowan v. Nelson*, 67.

Nonsuit—When Properly Overruled.

4. A motion for nonsuit made in an action to recover damages for personal injuries by reason of the negligence of plaintiff's employer, was properly overruled, where a *prima facie* case had been made out by plaintiff.—*Stephens v. Elliott*, 92.

Directed Verdict—When Properly Denied.

5. The denial of defendant's motion for an instructed verdict, in a personal injury case, where the evidence introduced on his behalf, while reasonably clear enough to have entitled him to a verdict, if believed by the jury, was contradictory of that offered by plaintiff, and did not present a case so clear and indisputable as would have justified the giving of the peremptory instruction requested, was not error.—*Stephens v. Elliott*, 92.

Master and Servant—Issues—Proof.

6. Where plaintiff's complaint, in an action to recover damages from his employer for personal injuries, alleged that he was injured while "pursuing his occupation of running a whim" at a mine, evidence that he had been actually employed for a different purpose, to-wit, as a teamster, but had been subsequently put to work running the whim against his protests, was admissible.—*Stephens v. Elliott*, 92.

Dangerous Machinery—Duty of Master—Instructions.

7. The court, in the action above set forth, correctly charged the jury that, in arriving at a verdict they might take into consideration the fact, if it was a fact, that plaintiff had been employed for a different character of work than that to which he was temporarily put, in order to determine whether the defendant, as master, had discharged his duty toward the servant to instruct him as to the dangerous character of such employment, if they found that such temporary employment was of a peculiarly dangerous character.—*Stephens v. Elliott*, 92.

Physicians—Demonstrative Evidence—Discretion.

8. It lay within the discretion of the district court to permit a physician, while testifying in a personal injury suit, to make use of the injured arm of plaintiff in an endeavor to explain his testimony to the jury, and, nothing appearing that such discretion had been abused, its action will not be disturbed on appeal.—*Stephens v. Elliott*, 92.

Evidence to Anticipate Defense—Order of Proof.

9. Error cannot be predicated upon the action of the court, in the cause set forth in the foregoing paragraph, in permitting plaintiff to introduce in his case in chief the testimony of a physician to the effect that plaintiff could not simulate the condition which the witness had found upon examination of the injured limb, or its consequences, where the objection was not that the proper order of proof—a matter largely in the discretion of the trial court—was not being followed, but that the testimony was incompetent and irrelevant.—*Stephens v. Elliott*, 92.

Evidence—Competency and Materiality.

10. Nor was the testimony, above referred to, incompetent and irrelevant, in view of the defendant's testimony tending to contradict plaintiff's contention that since the injury he had not been able to grasp anything with the hand of his injured arm.—*Stephens v. Elliott*, 92.

Physicians—Demonstrative Evidence—Discretion.

11. It was not error for the court to permit a physician, who had testified that the motor nerves of plaintiff's hand were entirely destroyed by the injury, and that, in sympathy with this condition, the sensory nerves, which control the feeling in the hand, had become so far paralyzed that no feeling remained in the hand, to demonstrate this before the jury by thrusting a hypodermic needle into the back of plaintiff's hand.—*Stephens v. Elliott*, 92.

Evidence—Mortality Tables—Judicial Notice.

12. In personal injury cases the district court takes judicial notice of standard mortality tables, offered for the purpose of showing the probable expectancy of plaintiff's life, and, if it is satisfied that the one offered is of that character, no further identification is necessary, and it may be read to the jury by an attorney not sworn as a witness in the case.—*Stephens v. Elliott*, 92.

Jury—Viewing Premises—Discretion.

13. Where, in a personal injury suit, drawings of the machinery, the faulty condition of which plaintiff alleged as the cause of his injury, had been presented to the jury for inspection, and, upon inquiry by the court, the jurors all stated that they understood the situation, the court acted within its discretion when it refused to direct a view of the machinery itself, at a mine a considerable distance from the place of trial.—*Stephens v. Elliott*, 92.

Master and Servant—Unsafe Machinery—Duty of Master.

14. The fact that defendant, as employer of plaintiff, did not know of defects in a piece of machinery by reason of which an injury was caused to the latter, is immaterial, if, by the exercise of ordinary care, he should have known of them; and, therefore, an instruction was not objectionable because it failed to advise the jury that in order to find for plaintiff they must find that defendant had knowledge of the alleged defects.—*Stephens v. Elliott*, 92.

Same—Instructions—Contributory Negligence.

15. An instruction, given in the action above, which, if standing alone would have warranted a verdict for plaintiff even though guilty of contributory negligence, was not erroneous, where in other instructions the subject of contributory negligence had been fully and clearly cov-

ered. Instructions should be considered as a whole.—*Stephens v. Elliott*, 92.

Contributory Negligence—Instructions.

16. Plaintiff had never been employed about a mine, nor had he ever seen a whim, prior to entering the service of defendant. He had worked three days when he was injured. He had been employed as a teamster, but was put to work on the whim, under protest that he was inexperienced in this character of work; nor had he received any warning of the dangers incident to running the whim. *Held*, that an instruction that the jury, in determining whether plaintiff was guilty of contributory negligence, might take into consideration his experience or lack of experience in the employment, and his knowledge or lack of knowledge of the dangers incident to running the whim, was correct. *Stephens v. Elliott*, 92.

Contributory Negligence—Assumption of Risk—Burden of Proof—Instructions.

17. Instructions, given in an action to recover damages for personal injuries, charging the jury that the burden of proof to establish the defenses of contributory negligence and assumption of risk was upon defendant, were correct, where the evidence on the part of plaintiff did not show, or tend to show, that his negligence contributed to his injury, or that he assumed the risk incident to his employment.—*Stephens v. Elliott*, 92.

Instructions—Assumption of Fact.

18. Defendant's requested instruction which assumed a fact directly at issue, to-wit, whether plaintiff had been employed for the purpose of running a whim at a mine, whereas plaintiff contended that he had been hired for a different purpose and put to work at the whim against his protests,—was properly refused.—*Stephens v. Elliott*, 92.

Master and Servant—Instructions—Contributory Negligence—Definition.

19. It was error to instruct the jury, in an action by an employee to recover damages from his employer for personal injuries, that contributory negligence constituted "such negligence upon the part of the plaintiff that, but for the same, he would not have been injured." The court in this instruction omitted from the definition a statement that such negligence must have concurred or co-operated with the negligent act of the defendant as a proximate cause of the injury complained of.—*Leary v. Anaconda C. Min. Co.*, 157.

Same—Contributory Negligence—Proximate Cause—Instructions.

20. Where plaintiff, a miner, claimed to have been injured by the falling of timber through a chute in which it was being hoisted to an upper level of the mine, the court erred in charging the jury that, if plaintiff could, in the exercise of reasonable care, have stepped into a position of safety, but, instead of doing so, remained exposed in a position of greater hazard and danger than was necessary, and such conduct on his part contributed to, and was the proximate cause of, his injury, he could not recover,—since, by the use of the definite article "the," instead of the indefinite "a," the jury may have been misled into believing that plaintiff's right to recover damages was not barred unless his negligence was the sole causal agency in producing the injury.—*Leary v. Anaconda C. Min. Co.*, 157.

Same—Assumption of Risk—Instructions.

21. A servant by virtue of his contract of employment not only tacitly agrees to assume such risks as are incident to his employment, but also such as should become apparent to him by ordinary observation, or are readily discernible by a person of his age and capacity,

and such as he discovers but fails to call to the attention of his employer; hence, an instruction that the risks assumed by the servant, as ordinarily incident to the character of his work, were only such as an ordinarily reasonable man, with his experience, could or might have, in the exercise of ordinary diligence and observation, discovered, announced an erroneous principle of law.—*Leary v. Anaconda C. Min. Co.*, 157.

Same—Safe Appliances—Duty of Master—Instructions.

22. With respect to the appliances furnished the servant by the master, the latter owes the former the duty only of exercising ordinary care, and to keep them in a reasonably safe condition; therefore, an instruction that it was the duty of defendant mining company to provide a reasonably safe and sufficient rope and chute with which and through which to hoist timbers, to make reasonable inspection thereof, to use ordinary care in so doing, and that defendant was liable if its inspection failed to discover what a reasonable examination would have disclosed, was erroneous.—*Leary v. Anaconda C. Min. Co.*, 157.

Same—Appliances—Inspection—Instructions.

23. The court charged that, even though the workmen employed about that portion of the mine where plaintiff was injured, or the timbermen, could have inspected the chute or rope, the alleged defect in which caused the injury, and, if they had found either insufficient or unsafe, could have reported the same, when defendant would have furnished a new rope or repaired the chute, this would not constitute a defense if the chute was not reasonably safe, and plaintiff, by reason thereof, sustained damage without fault on his part and without knowing the risk, but such matters, with other facts and circumstances, might be considered by the jury in determining what would be a reasonable inspection, and whether defendant performed its duty to inspect. *Held*, that the instruction placed too great a burden on defendant company in the way of responsibility to its servants and practically amounted to a statement that plaintiff could recover in any event.—*Leary v. Anaconda C. Min. Co.*, 157.

Same—Evidence—Custom of Miners.

24. In an action for injuries to a miner by a timber falling while being hoisted through an alleged defective chute by means of a faulty rope, evidence that, where a signal is given to hoist a timber through a raise, it is the general custom among miners for the man giving the signal to stand clear, was admissible.—*Leary v. Anaconda C. Min. Co.*, 157.

Excessive Damages—Jury—Abuse of Discretion.

25. In personal injury cases the amount to be awarded is left to the fair discretion of the jury, under the facts of the particular case, and damages so awarded, even if comparatively large, will not be held determinative of an abuse of such discretion, unless so disproportionate to the injury complained of as to shock the moral sense.—*Lewis v. Northern Pac. Ry. Co.*, 207.

Excessive Damages—When not Ground for New Trial.

26. Where an amount awarded by the jury for personal injuries, claimed by defendant to have been so excessive as to amount to an abuse of the discretion lodged in it, may have been the result of a miscalculation, or based upon a wrong standard, the award cannot be said to have been the result of passion or prejudice so as to entitle the defendant to a new trial under subsection 5 of section 1171 of the Code of Civil Procedure.—*Lewis v. Northern Pac. Ry. Co.*, 207.

Excessive Damages—New Trial—Remission of Excess.

27. *Held*, that the district court, in an action for damages for personal injuries alleged to have been suffered by plaintiff, a brakeman on a railroad, through the loss of his left hand, was justified in granting a new trial conditioned upon the remission of \$7,400 from a verdict for \$17,400, and in thereafter, with plaintiff's consent, scaling it to \$10,000, and that such latter amount was not excessive in view of all the circumstances in the case.—*Lewis v. Northern Pac. Ry. Co.*, 207.

Damages—Elements—Impairment of Earning Capacity.

28. In arriving at a verdict in a personal injury case, the jury, in addition to the mental and physical pain suffered by plaintiff and the disfigurement of his person, should also take into consideration, where earning capacity depends upon bodily strength, the fact that his physical condition becomes impaired by advancing age, and that, as a consequence, his earning capacity is diminished thereby.—*Lewis v. Northern Pac. Ry. Co.*, 207.

Master and Servant—Negligence of Fellow-servants—Master's Liability.

29. In the absence of a statute to the contrary, a master is not liable to one servant for injury caused by the negligence of another servant in the same common employment, unless the negligent servant was the master's representative, or the master was negligent in employing or retaining him.—*McIntosh v. Jones*, 467.

Same—Selecting of Fellow-servants—Duty of Master.

30. An employee of a transfer company was not entitled to recover damages from his employer for injuries alleged to have been sustained by reason of defendant's failure to exercise ordinary care in selecting a reasonably competent fellow-servant to assist plaintiff in moving a piano, where it appeared that all that was required of the helper was strength and ordinary intelligence, which he possessed, and that plaintiff was injured by the assistant releasing his hold on the piano contrary to plaintiff's orders.—*McIntosh v. Jones*, 467.

Verdict—Chance—Duty of District Court.

31. In an action for damages for personal injuries, the jury returned a verdict for \$18,750. Upon polling of the jury the court inquired if the verdict had been reached by chance. Several of the jurors' answer was in the affirmative. The court thereupon directed them to again retire and find a verdict by "deliberation and reasoning thereon," excluding the element of chance. A verdict for \$20,000 was then returned shortly afterward. *Held*, that the action of the court was unauthorized; that the verdict first returned should have been received, and that it could only be set aside upon application of the party aggrieved, under section 1171 of the Code of Civil Procedure, providing for a new trial on the ground that the jury had resorted to chance in arriving at their verdict.—*Harrington v. Butte, Anaconda & Pac. Ry. Co.*, 478.

Cities and Towns—Defective Sidewalks—Notice of Claim.

32. Where, in an action against a city for personal injuries, a notice of claim for damages, marked "filed" by the city clerk and bearing an indorsement that the claim had been referred to the judiciary committee of the council and disallowed, was received in evidence without objection, the requirements of Laws of 1903, page 166, relative to giving notice of such a claim, were shown to have been sufficiently complied with.—*O'Flynn v. City of Butte*, 493.

Same—Defects in Sidewalk—Latent—Patent.

33. The testimony, in an action against a city for damages for personal injuries sustained on account of a defective sidewalk, on the

question whether a board in the walk was broken and the defect in it discernible to the eye or not, having been conflicting, and the jury having returned a verdict in favor of the plaintiff, it will be held that the defect was not latent, but could be seen.—*O'Flynn v. City of Butte*, 493.

Same—Defects in Walk—Imputed Knowledge.

34. *Held*, in the above action, where actual notice of the defective sidewalk on the part of the city had not been shown, that the court (under the evidence examined) properly submitted to the jury the question whether knowledge of the faulty condition of the walk could be imputed to the defendant.—*O'Flynn v. City of Butte*, 493.

Same—Evidence—Admissibility.

35. The daughter of plaintiff in the action above told a girl friend where her mother fell. The friend, as a witness in the cause, deposed to the fact that she fell at the same place, identifying it. There was also testimony that no broken boards other than the one alleged to have been the cause of the injury, existed in the immediate vicinity. *Held*, that the admission in evidence of the daughter's statement that she told her friend where her mother claimed to have been hurt was not prejudicial error.—*O'Flynn v. City of Butte*, 493.

Same—Instructions—Presumptions.

36. An instruction that a person in the exercise of ordinary care, and without knowledge of any defects in, or the dangerous condition of, a sidewalk, might rely on the presumption that the sidewalk was in an ordinarily safe condition for travel, was not objectionable for failure to charge that, if the traveler had previous knowledge of the dangerous condition of the walk, the presumption did not apply. The rule laid down was correct, and if defendant relied upon plaintiff's knowledge as nullifying the effect of the presumption, it should have asked an instruction covering the point.—*O'Flynn v. City of Butte*, 493.

Same—Evidence—Sufficiency.

37. Where, in an action for injuries caused by a defective sidewalk, a witness testified that she had fallen on the walk at the same place a week before, and that two days after plaintiff was injured the loose plank which constituted the defect was in the same condition as when witness fell, the proof was sufficient to go to the jury on the question whether the condition of the walk remained the same from the time the witness fell until plaintiff was injured.—*O'Flynn v. City of Butte*, 493.

Railroads—Negligence—Question for Jury.

38. A motion of defendant railway company for a directed verdict in an action against it for negligently killing plaintiff's intestate while crossing its tracks within city limits was properly overruled, where, under the evidence, the question whether defendant was negligent was one for the jury, as was also the question of decedent's alleged contributory negligence.—*Riley v. Northern Pac. Ry. Co.*, 545.

Same—Ordinary Care—Question for Jury.

39. Whether or not the railway company in the case above exercised ordinary care in moving its engine over a crossing provided with gates while the gates were up, and in the absence of a watchman in the tower, was a question for the jury.—*Riley v. Northern Pac. Ry. Co.*, 545.

Same.

40. It was also a question for the jury to decide whether the defendant company, in the exercise of ordinary care, might have discovered the position of the deceased in time to have avoided injuring him,

irrespective of the question whether deceased had exercised ordinary care in going into the place where he was killed, or not.—*Riley v. Northern Pac. Ry. Co.*, 545.

Same—Care Required by.

41. Upon a railroad company is imposed the duty of using all reasonable efforts to avoid injury to one who has accidentally placed himself in a position of danger, if it knows the peril, or, by the exercise of reasonable care, might have known it.—*Riley v. Northern Pac. Ry. Co.*, 545.

Negligence—Contributory Negligence—Last Clear Chance—Instructions—Argument—Issues.

42. Where all the testimony in the above case relating to the last clear chance to avoid the injury, went in without objection under the issues made by the complaint and answer, the doctrine of the last clear chance was a legitimate subject for argument to the jury and of instruction by the court, though no such issue was raised by the reply to the plea of contributory negligence.—*Riley v. Northern Pac. Ry. Co.*, 545.

Contributory Negligence—Pleadings.

43. To make the defense of contributory negligence available to defendant, it must be specially pleaded, unless such negligence appears from the allegations of the complaint, or unless plaintiff's own case raises a presumption of it.—*Birsch v. Citizens' Electric Co.*, 574.

Same—Insufficiency of Pleading.

44. Since contributory negligence on the part of plaintiff in a personal injury action presupposes negligence on the part of defendant, an answer which denies any negligence on defendant's part and alleges that the injury complained of resulted wholly from plaintiff's own negligence, is insufficient to plead contributory negligence.—*Birsch v. Citizens' Electric Co.*, 574.

Negligence—Definition.

45. The definition of negligence as being "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done," approved.—*Birsch v. Citizens' Electric Co.*, 574.

Electricity—Contributory Negligence—Presumptions.

46. Plaintiff, while working as a hodcarrier on a scaffold made wet by rain, stepped on a mortar board and slipped. He threw out his hands, and in doing so, came in contact with defendant company's wire, heavily charged with electricity, causing him to become insensible and fall to the ground on a pile of rocks. *Held*, that under this condition of the evidence it cannot be said that plaintiff's own case raised a presumption of contributory negligence, so as to relieve defendant from pleading it, but that the only fair inference deducible would seem to be that his slipping was an accident and the throwing out of his hands a purely involuntary act.—*Birsch v. Citizens' Electric Co.*, 574.

Contributory Negligence—Burden of Proof.

47. Where, in an action for personal injuries, contributory negligence is properly pleaded as a defense, the burden of proving it rests upon defendant, and plaintiff is not called upon to show that his own heedlessness was not the cause of his injury.—*Birsch v. Citizens' Electric Co.*, 574.

Electricity—Negligence—Proximate Cause—Question for Jury.

48. The question whether an electric company's negligence in failing to properly insulate an electric wire, which was heavily charged with

electricity and with which plaintiff, a hodecarrier, while working on a scaffold in close proximity to the wire, in slipping accidentally came in contact, was the proximate cause of injuries sustained by plaintiff in falling upon a pile of rocks, was one for the jury.—*Birsch v. Citizens' Electric Co.*, 574.

Electricity—Negligence *per se*—Presumptions.

49. Where a workman, while working on a wet scaffold, slipped and in throwing out his hands came in contact with an electric company's live wire and was injured, the accidental slipping cannot be said to be negligence *per se* on his part, since the law presumes that plaintiff exercised ordinary care in the premises.—*Birsch v. Citizens' Electric Co.*, 574.

Same—Electricity—Negligence—Proximate Cause.

50. Where the primary cause of a personal injury was plaintiff's accidental slipping on a scaffold used in the erection of a building, and the negligence of an electric company in failing to have a live wire properly insulated was the co-operating or culminating cause of the injury sustained by plaintiff in coming in contact with it, he being rendered insensible and falling upon a pile of rocks, the negligence of the company was the proximate cause of the injury.—*Birsch v. Citizens' Electric Co.*, 574.

PHYSICIANS AND SURGEONS.

See Personal Injuries, 8-11.

PLEADING AND PRACTICE.

Principal and Agent—Demand for Money Collected—Sufficiency.

1. A motion for nonsuit made in an action by plaintiff, an express and passenger transportation company, to recover from its agent money collected for it but not turned over, on the ground that proper demand had not been pleaded or proved, was properly overruled, where the complaint alleged failure to pay, "although frequently requested by plaintiff so to do," and where plaintiff's testimony disclosed some evidence of a demand on plaintiff's part.—*Judith Inland Transportation Co. v. Williams*, 25.

Same—Demand—When Unnecessary—Instructions.

2. Where it appeared that defendant in the action set out in the above paragraph had always claimed that plaintiff's demand had been fully satisfied, and that, instead of being indebted to plaintiff, the latter was indebted to him, no formal demand upon him for payment was necessary; and in refusing an instruction charging that, in the absence of an allegation that demand had been made, plaintiff could not recover, the court acted properly.—*Judith Inland Transportation Co. v. Williams*, 25.

Divorce—Residence of Plaintiff—Complaint.

3. The fact that plaintiff in a suit for divorce has been a resident of the state for the statutory period of one year next preceding the commencement of the suit (Civ. Code, sec. 176) must be alleged in the complaint in order to confer jurisdiction of the cause upon the trial court.—*Bumping v. Bumping*, 39.

Pleadings—Complaint—Jurisdiction—Appeal.

4. The objection that a complaint fails to allege a jurisdictional fact may be raised for the first time on appeal.—*Bumping v. Bumping*, 39.

Complaint—Sufficiency—Demurrer.

5. If, under the facts stated in a complaint, the plaintiff is entitled to the relief demanded, or *any* relief, it is proof against a general demurrer.—*Donovan v. McDevitt*, 61.

Complaint—Demurrer—When It will not Lie.

6. Where it appeared from the face of a complaint that defendant was indebted to plaintiff in a certain amount for money had and received, the pleading was proof against a general demurrer, and the fact that plaintiff demanded equitable relief by way of an accounting was immaterial.—*Donovan v. McDevitt*, 61.

Complaint—Prayer.

7. The prayer of the complaint is no part of the statement of a cause of action.—*Donovan v. McDevitt*, 61.

Complaint—Prayer—Demurrer—When Improper.

8. While section 671 of the Code of Civil Procedure makes the prayer a part of the complaint, it is made such part independently of the statement of facts constituting the cause of action, and if the facts stated in the body of the complaint entitle plaintiff to any relief, it is error to sustain a general demurrer, no matter what may be the form of the prayer, or whether there be any prayer at all.—*Donovan v. McDevitt*, 61.

Same.

9. Informality of the prayer in a complaint, or the total absence of one, not being one of the defects named in section 680 of the Code of Civil Procedure for which a demurrer will lie to the complaint, a demurrer for that reason should not be sustained, notwithstanding the provision of section 1003 of the same code, that the relief granted to plaintiff, if there be no answer, cannot exceed that demanded in his complaint.—*Donovan v. McDevitt*, 61.

Fraud.

10. While in pleading fraud the facts constituting it, and not the legal conclusion, must be stated, it is not necessary that all of the facts be set forth in detail, but if the ultimate probative facts are stated, it is sufficient.—*State v. Phillips*, 112.

Execution Sale—Injunction—Complaint—Sufficiency.

11. The complaint in an action to enjoin the levying of an execution issued upon a deficiency judgment, which alleged that an execution had been issued in a cause wherein one C. was defendant, that the sheriff levied upon and sold the property in controversy as the property of C. and that thereafter C., the judgment debtor, for value sold and conveyed the premises by a good and sufficient deed to plaintiff, sufficiently alleged the ownership of C., in the absence of a demurrer, assuming that such an allegation was necessary.—*McQueeney v. Toomey*, 282.

Trial—Amendment—Refusal—Error.

12. Where the district court permitted plaintiff, after commencement of trial of an action to recover real property, to amend his complaint, which, prior to amendment, stated no cause of action, it was error to refuse permission to defendant to amend her answer.—*O'Toole v. Copeland*, 344.

Estoppel.

13. To be available as a defense, estoppel must be pleaded.—*Eisenhauer v. Quinn*, 368.

Injunction—Complaint—Requisites.

14. Plaintiff in his complaint for an injunction restraining a sheriff from removing a house, theretofore adjudged in an action in claim and delivery to belong to one from whom it had been wrongfully taken, attached to the tort-feasor's land and later by him sold to plaintiff, simply alleged that he had no plain, speedy or adequate remedy at law. He failed to state that the sheriff was insolvent, or that his official bond was insufficient; nor was there an allegation that the injury which would be occasioned to plaintiff by removal of the house, could not be compensated in damages. *Held*, that in the absence of such allegations, the complaint failed to state a cause of action for an injunction.—*Eisenhauer v. Quinn*, 368.

Homicide—Information.

15. Allegations sufficient for a common-law indictment for murder suffice for an information under the Code.—*State v. McGowan*, 422.

Practice—New Trial—Motion—Affidavits—Filing—Time.

16. Section 1173, Code of Civil Procedure, allows ten days after notice of motion for a new trial in which to prepare, serve, and file the affidavits, statement, etc. A finding and decision having been filed August 30, 1905, a written stipulation was made on September 6th that either party might have thirty days' "additional" time in which to give notice of intention to move for a new trial, and ninety days' "additional" time in which to prepare, serve, and file affidavits, bills of exception, or statements in support of the motion. Appellant gave notice of motion for a new trial October 7th, and all the affidavits were filed January 3, 1906. *Held*, that appellant was entitled to thirty days in addition to the four days of the ten-day period not yet expired when the stipulation was made, in which to serve notice of motion for a new trial, and that the ninety days stipulated for in which to file affidavits, bills of exception, or statements, etc., in support of the motion, began to run on the expiration of ten days after the service of notice, and hence that the affidavits were filed in time.—*Hill v. McKay*, 440.

Construction of Pleadings.

17. In determining whether a complaint states a cause of action or entitles plaintiff to any relief, matters of form and allegations that are irrelevant or redundant will be disregarded, and if upon any view plaintiff is entitled to any relief, the pleading will be sustained.—*Raymond v. Blancgrass*, 449.

Conversion—Complaint—Sufficiency.

18. A complaint which alleges that defendants, at a certain time and place combined and conspired together to hinder and defraud plaintiff in her rights in her husband's property; that, while she had an action pending against her husband for separate maintenance, they wrongfully took and carried away certain sheep then and there the property of her husband and in his possession, does not state a cause of action for conversion; for in such an action plaintiff must allege and prove a general or special ownership in the property and a right to the immediate possession of it at the time of the unlawful taking.—*Raymond v. Blancgrass*, 449.

Conversion—Complaint—Sufficiency.

19. The complaint of a wife, who had obtained a decree against her husband for separate maintenance, in an action to recover damages from third persons for conspiracy, alleged to have been entered into with a view to defeat any decree she might obtain, by removing and disposing of her husband's chattels, was insufficient where it did not appear therefrom that she had any special right in the property, and

where the conversion occurred prior to the time she became her husband's creditor by the entry of the decree in the suit for separate maintenance.—*Raymond v. Blanckgras*, 449.

Creditors' Bill—Complaint—Insufficiency.

20. A complaint which alleged that the defendants conspired together, pending a suit by plaintiff against her husband for separate maintenance, to defraud plaintiff of her rights in her husband's property and to render ineffective any decree she might obtain against him, but failed to state that the husband assisted in fraudulently disposing of or concealing it, or that plaintiff had acquired a lien on the chattels, or that a trust therein existed in her favor, had none of the attributes of a creditor's bill; nor was it good as a bill of discovery.—*Raymond v. Blanckgras*, 449.

Action for Wages—Complaint—Sufficiency.

21. In an action to recover wages due for services rendered to a partnership of which defendant was a member, an allegation that the partners upon winding up their affairs, had an accounting, and as part consideration for same, defendant agreed to pay plaintiff the balance due him from the firm, while somewhat indefinite and uncertain, sufficiently stated a consideration for defendant's promise to pay plaintiff the money due him from the firm.—*Carlson v. Barker*, 486.

Pleading—Uncertainty—Special Demurrer.

22. If a defendant in a civil action desires a complaint to be made more definite and certain, he should file a special demurrer for that purpose in the trial court.—*Carlson v. Barker*, 486.

Objections not Raised in District Court.

23. An objection to the introduction of testimony not urged in the district court will not be reviewed on appeal.—*O'Flynn v. City of Butte*, 493.

Judgment—Pleadings to Sustain—Reply.

24. A judgment for plaintiff for affirmative relief cannot be based upon allegations which appear in the reply only.—*Manuel v. Turner*, 512.

Replication—Aiding Complaint.

25. The replication cannot be looked to to broaden the scope of the complaint or aid it in any way.—*Manuel v. Turner*, 512.

Foreclosure—Complaint—Adjustment of Equities.

26. Where the complaint in a mortgage foreclosure suit stated that defendants other than the mortgagors had or claimed interests in or liens on the premises, as judgment or attaching creditors, but that their interests or liens were subordinate to plaintiff's mortgage, and demanded that the priority of the mortgage lien be fixed and established, and that the liens of such other defendants be declared inferior to it, the court properly adjusted these equities in the decree.—*Manuel v. Turner*, 512.

Equity Cases—Appeal—Final Disposition—Practice.

27. Since the evident purpose of the Act of 1903 (Laws 1903, 2d Extra. Session, p. 7), requiring the supreme court to determine all questions of fact as well as of law in equity cases, unless for good cause a new trial or the taking of further testimony be ordered, is to expedite the entry of final judgment in such cases, and thus put an end to litigation, it is the duty of the parties to introduce all their testimony in the trial court, in order to enable the appellate tribunal to carry out the intention of the Act.—*Stevens v. Trafton*, 520.

Same.

28. On appeal in equity cases, defendant's motion for judgment at the conclusion of plaintiff's case will be construed as a declaration that, in case his motion is granted, he elects to stand upon the case made by plaintiff, and final judgment on appeal will be entered accordingly, and new trials in such cases will not be ordered except for good cause shown in the record.—*Stevens v. Trafton*, 520.

Personal Injuries—Contributory Negligence.

29. To make the defense of contributory negligence available to defendant, it must be specially pleaded, unless such negligence appears from the allegations of the complaint, or unless plaintiff's own case raises a presumption of it.—*Birsch v. Citizens' Electric Co.*, 574.

Same—Contributory Negligence—Insufficiency of Pleading.

30. Since contributory negligence on the part of plaintiff in a personal injury action presupposes negligence on the part of defendant, an answer which denies any negligence on defendant's part and alleges that the injury complained of resulted wholly from plaintiff's own negligence, is insufficient to plead contributory negligence.—*Birsch v. Citizens' Electric Co.*, 574.

POLICE COURTS.**Criminal Law—Change of Venue—Justices' Courts.**

1. *Obiter*: A police judge may, under Penal Code, section 2685, grant a change of the place of trial of a criminal cause pending before him, upon a motion, supported by a proper showing, either for bias or prejudice of such judge, or prejudice in the citizens of the township.—*In re Graye*, 394.

POLICE OFFICERS.

Credibility,—see *Criminal Law*, 34.

POWERS.

See *Officers*, 1.

PREFERENCE.

See *Bankruptcy*.

PRESCRIPTION.

See *Highways*.

PRESUMPTIONS.**Evidence—Failure to Call Witnesses.**

1. The failure of plaintiff in an action against his employers for personal injuries to call as witnesses in his behalf several of his employees—presumably fellow-servants—who were present at the time and place of the injury, raised the presumption that their testimony would have been unfavorable to him.—*McGowan v. Nelson*, 67.

See *Ipsa Loquitur*—When Doctrine will not Apply.

2. The doctrine of *res ipsa loquitur* rests upon the presumption that, in view of the surrounding circumstances, the accident to plaintiff would not have happened if defendant had exercised ordinary care; therefore, where the evidence was silent as to the cause of the accident and the

attendant circumstances left room for the conclusion that the injury complained of might have occurred by reason of the negligence of plaintiff's fellow-servants, the doctrine cannot be invoked.—*McGowan v. Nelson*, 67.

Appeal—Record—Findings—Evidence—Sufficiency.

3. (On Motion for Rehearing.) Where much of the testimony presented for review, in an action wherein it was sought to establish a street by prescription, was unintelligible by failure of counsel to have witnesses designate by some mode of identification certain points upon maps introduced in evidence, the presumption must obtain that the testimony, thus rendered unintelligible on review, was understood by the court making it as lending support to its finding in favor of the issue.—*Pope v. Alexander*, 82.

Criminal Law—Degree of Crime—Determination by Court—Appeal.

4. The jury in finding a verdict of guilty of the crime of attempted burglary, left the punishment to be fixed by the court. While the crime of burglary is divided into first and second degrees, and in such case the jury must find the degree, an attempt to commit that offense is not so divided. The court, under section 1230, subdivision 1, Penal Code, imposed a sentence of seven and one-half years in the state's prison, one-half the maximum punishment authorized for the crime of burglary in the first degree. The evidence was absent from the record on appeal. *Held*, that in the absence of the testimony, it will be presumed that the court had evidence before it justifying a finding that, if guilty at all, the defendant was guilty of an attempt to commit burglary in the night-time, which constitutes the first degree of the offense, and that the punishment inflicted was proper. (Mr. Chief Justice Brantly dissenting.)—*State v. Mish*, 168.

Criminal Law—Instructions—Appeal—Record.

5. An instruction was given by the court in a prosecution for robbery, referring to "the last two instructions" on the subject of punishment which might be inflicted. Neither of these instructions, however, dealt with that subject. The jury, after retiring, returned into court and requested further instructions relative to the matter of punishment. Such instructions were given, but the record was silent as to their nature. The certificate of the clerk was to the effect that the record contained copies of all papers constituting the judgment-roll. *Held*, that, since it is incumbent upon appellant to point out the specific error upon which he relies, and since proper instructions on the subject of punishment were given, in the absence of anything to show which instructions were given in response to the request of the jury, the presumption in favor of the action of the trial court will be indulged.—*State v. Paisley*, 237.

Interpleader—Payment into Court.

6. Where the defendant in an action on an account had paid the sum in litigation into court and asked that another be substituted in his place and the plaintiff and such defendant be required to adjudicate their respective claims to it, and the parties thereafter proceeded upon the assumption that such payment had actually been made, it will be presumed that the fact that the amount was in the hands of the clerk had been ascertained by the court prior to adjudging it to belong to the party entitled thereto, and its judgment will not be reversed for lack of evidence in this respect.—*Anderson v. Red Metal Min. Co.*, 312.

Cities and Towns—Sidewalks.

7. An instruction that a person in the exercise of ordinary care, and without knowledge of any defects in, or the dangerous condition of,

a sidewalk, might rely on the presumption that the sidewalk was in an ordinarily safe condition for travel, was not objectionable for failure to charge that, if the traveler had previous knowledge of the dangerous condition of the walk, the presumption did not apply. The rule laid down was correct, and if defendant relied upon plaintiff's knowledge as nullifying the effect of the presumption, it should have asked an instruction covering the point.—*O'Flynn v. City of Butte*, 493.

Same—Invalidity—Official Duty.

8. Where a tax deed showed its invalidity upon its face, in that the county had been a competitive bidder at the sale contrary to statute, the presumption that official duty had been regularly performed will not protect a grantee of the county, nor may in such a case the provisions of section 3897, Political Code, making tax deeds *prima facie* evidence of the fact, among other things, that the property was sold as prescribed by law, be relied upon.—*Rush v. Lewis & Clark County et al.*, 566.

Personal Injuries—Electricity—Contributory Negligence.

9. Plaintiff while working as a hodcarrier on a scaffold, made wet by rain, stepped on a mortar board and slipped. He threw out his hands and in doing so came in contact with defendant company's wire, heavily charged with electricity, causing him to become insensible and fall to the ground on a pile of rocks. *Held*, that under this condition of the evidence it cannot be said that plaintiff's own case raised a presumption of contributory negligence, so as to relieve defendant from pleading it, but that the only fair inference deducible would seem to be that his slipping was an accident and the throwing out of his hands a purely involuntary act.—*Birsch v. Citizens' Electric Co.*, 574.

Same—Electricity—Negligence *per se*.

10. Where a workman, while working on a wet scaffold, slipped and in throwing out his hands came in contact with an electric company's live wire and was injured, the accidental slipping cannot be said to be negligence *per se* on his part, since the law presumes that plaintiff exercised ordinary care in the premises.—*Birsch v. Citizens' Electric Co.*, 574.

PRINCIPAL AND AGENT.

See, also, Insurance, 13, 14.

Recovery of Money Collected by Agent—Accounting—Pleadings—Theory of Case.

1. Plaintiff company sued to recover moneys, collected by defendant while acting as its agent, which he failed to pay over after demand. By a second count, a sum of money, alleged to have been collected by defendant for other parties, while acting as plaintiff's agent, but which he neglected to forward to the persons entitled thereto and which plaintiff was required to pay, was sought to be recovered. Full payment of plaintiff's claim was pleaded by defendant, and judgment in a fixed amount demanded by way of counterclaim. There was no allegation in the answer that an accounting was necessary and none was asked. The action was tried as one at law to recover a money judgment. *Held*, that the action was one at law and not a suit in equity for an accounting.—*Judith Inland Transportation Co. v. Williams*, 25.

Same—Nonsuit—Demand—When not Necessary—Sufficiency.

2. A motion for nonsuit made in an action by plaintiff, an express and passenger transportation company, to recover from its agent money collected for it but not turned over, on the ground that proper demand had not been pleaded or proved, was properly overruled, where the

complaint alleged failure to pay, "although frequently requested by plaintiff so to do," and where plaintiff's testimony disclosed some evidence of a demand on plaintiff's part.—*Judith Inland Transportation Co. v. Williams*, 25.

Same—Demand—When Unnecessary—Instructions.

3. Where it appeared that defendant in the action set out in the above paragraph had always claimed that plaintiff's demand had been fully satisfied, and that, instead of being indebted to plaintiff, the latter was indebted to him, no formal demand upon him for payment was necessary; and in refusing an instruction charging that, in the absence of an allegation that demand had been made, plaintiff could not recover, the court acted properly.—*Judith Inland Transportation Co. v. Williams*, 25.

Unauthorized Act of Agents—Ratification.

4. A fraternal insurance society had never intentionally conferred authority upon its local collector to waive delinquency or to receive current dues after delinquency, nor did the collector believe that he had such authority. The delinquent knew that only the secretary of the grand body could reinstate him. The dues, both delinquent and current paid to the collector were never forwarded to the central body but retained by him subject to the approval of the application for reinstatement. Immediately upon receipt of the application it was rejected and the collector directed to tender back the amount paid. *Held*, that a ratification by the society of the unauthorized act of its local collector had not been shown, and that therefore the insurer was not estopped to claim a forfeiture.—*Kennedy v. The Grand Fraternity*, 325.

PUBLIC POLICY.

How to be Determined.

1. Courts may not arbitrarily declare an act or contract void as against public policy; but the question of its invalidity in this respect must be determined by them in view of legislative declarations, or, in their absence, by reference to judicial decisions.—*Picket Pub. Co. v. Board of County Commrs.*, 188.

Contracts—Illegality—Procurement of Testimony.

2. A contract by the terms of which plaintiff in effect agreed, for a consideration of \$50,000, to furnish evidence which would enable defendant to either win two certain suits, or one of them, upon trial or which would put the latter in such a position that he could force a favorable settlement of one or both of them, had a tendency to impede the due administration of justice and was, therefore, void as against the policy of the law.—*Hughes v. Mullins*, 267.

PUBLIC PRINTING.

See *County Commissioners*, 2-4.

PURCHASER FOR VALUE.

See, also, *Fixtures*, 4.

When Defense Available.

1. *Obiter*: The defense of purchase for value and without notice may be interposed only as against the holder of an equitable title.—*Eisenhauer v. Quinn*, 368.

QUANTUM MERUIT.

See *Mechanics' Liens*, 1.

QUIETING TITLE.

See, also, *Highways*, 1-5.

Transactions with Deceased Persons—Witnesses—Competency.

1. Where defendants, in a suit brought by plaintiff, as administrator, to quiet title to certain portions of mining property, claimed title under deeds of grant from plaintiff's intestate and prayed that their titles be quieted as against the estate represented by plaintiff, they were simply attempting to protect themselves against the claims and demands of plaintiff, and were not asserting "a claim or demand against the estate" of deceased, so as to make them incompetent to testify, under the provisions of Laws of 1897, page 245, as to any matter of fact occurring before their grantor's death.—*Collins v. McKay*, 123.

Character of Action—How Determined—Relief.

2. Defendants in a suit of the character set forth in the above paragraph are entitled to such relief as their proof warrants, and the character of the action may not be determined from a casual remark of either court or counsel during trial, but must be arrived at from the pleadings.—*Collins v. McKay*, 123.

Uncertainty in Description—Declarations.

3. In a suit by an administrator to quiet title to mining property, claimed by defendants under deeds of grant from plaintiff's intestate, for alleged uncertainty of description, declarations of defendant's grantor relative to the title conveyed and the location of the portions transferred, were admissible against the administrator.—*Collins v. McKay*, 123.

RAILROADS.**Liability to Employees—Statutes—Constitution—Equal Protection of Laws.**

1. *Held*, that the enactment of Chapter 83 of Laws of 1903, page 156, relative to the liability of railway corporations for damages sustained by an employee by reason of the negligence of certain of his therein enumerated coemployees, is a valid exercise of legislative power, under Article XV, sections 2 and 3 of the Constitution, reserving to the state the right to alter or amend corporate charters theretofore granted; and that, therefore, the Act is not open to the objection that it deprives railway corporations of the equal protection of the laws, guaranteed to all under the Fourteenth Amendment to the United States Constitution, by subjecting them to liabilities not imposed upon natural persons or other corporations engaged in the same pursuit.—*Lewis v. Northern Pac. Ry. Co.*, 207.

Death—Negligence—Directed Verdict.

2. A motion of defendant railway company for a directed verdict in an action against it for negligently killing plaintiff's intestate while crossing its tracks within city limits was properly overruled, where, under the evidence, the question whether defendant was negligent was one for the jury, as was also the question of decedent's alleged contributory negligence.—*Riley v. Northern Pacific Ry. Co.*, 545.

Same—Instructions.

3. The giving of an instruction, in an action to recover damages from a railway company for the negligent killing of a pedestrian while crossing its tracks, substantially consisting of a statement of the pleadings, was not reversible error.—*Riley v. Northern Pacific Ry. Co.*, 545.

Injuries at Crossings—Instructions.

4. In an action for damages for the death of one struck by an engine while crossing defendant's tracks, there was evidence for defendant that the bell was ringing and a headlight burning. Plaintiff's witnesses testified that they did not hear any bell or see any light. Defendant's witnesses swore that they did not see the deceased at all, although the engineer claimed he was looking toward the very spot where the accident happened. *Held*, that the court properly refused to charge that it was proved by the uncontradicted evidence that the bell was ringing and the headlight burning, that the ringing and the light were a sufficient warning, and that, if no other negligence was shown, the verdict must be for defendant.—*Riley v. Northern Pacific Ry. Co.*, 545.

Same—Instructions.

5. The court in the case above referred to having distinctly instructed the jury to limit their consideration to acts of negligence proven by the evidence, it was not prejudicial error to refuse to charge, relative to an allegation in the complaint that the speed of the engine exceeded a certain limit—a fact unproven—that the evidence uncontradictedly showed that the speed of the engine was less than the prescribed limit, and that this question should not be considered, but that, if no other negligence appeared, verdict should be for defendant.—*Riley v. Northern Pacific Ry. Co.*, 545.

Same—Ordinances—Instructions.

6. The absence of a city ordinance requiring a railway company to provide a flagman at a crossing is not conclusive upon the question whether or not the company was negligent in failing to provide one of its own accord; it was, therefore, not error to refuse to charge in the action above set forth that an ordinance, alleged in the complaint to have been violated, had no reference to the crossing at which plaintiff's intestate was killed.—*Riley v. Northern Pacific Ry. Co.*, 545.

Same—Evidence—Admissibility—Harmless Error.

7. In an action for the death of one struck by a switch-engine while crossing defendant's tracks, where it was shown that there was a gate at each side of the crossing, but that on account of the lessened travel between the hours of 12 o'clock midnight and 6 o'clock in the morning the gates were not used, and that the deceased was killed during such hours, and further, that the mayor had never designated the crossing as one where a flagman was required, it was not prejudicial to defendant to admit in evidence an ordinance requiring a railroad to keep a flagman at such crossings unprotected by gates as might be designated by the mayor from time to time, since the jury must have known that the mayor had never required a flagman at the crossing in question, and therefore could not have considered that the company was negligent in failing to provide a flagman at such crossing on account of the fact that the mayor had designated it as one of the crossings where a flagman should be employed.—*Riley v. Northern Pacific Ry. Co.*, 545.

Same—Instructions.

8. Nor was it error to refuse to instruct the jury in the above action that, in determining whether a reasonable person could have seen the approaching engine, the jury could take into consideration what other persons coming after decedent saw in this regard. This was proper matter for argument to the jury and not for an instruction to them.—*Riley v. Northern Pacific Ry. Co.*, 545.

Same—Instructions—Applicability to Evidence.

9. Where in an action against a railway company for the negligent killing of a person it was not shown that decedent had assumed a position of known danger, or that the place where he was killed was

not, apparently, a place of safety, the court correctly refused to charge that in thus failing to exercise ordinary care or reasonable prudence he was guilty of contributory negligence and defendant company would not be liable, where in other instructions the question of contributory negligence had been fully covered; the requested charge was properly refused, also, for failing to refer to the duty of the defendant to exercise ordinary care to protect the deceased in the position in which he found himself.—*Riley v. Northern Pacific Ry. Co.*, 545.

Same—Instructions—Refusal.

10. In an action for the death of one struck by an engine while crossing defendant's tracks and attempting to get out of the way of a coming passenger train, there was no error in refusing to charge that in any event, if the deceased was at fault in putting himself in a position where a movement to avoid the dust of the passenger train would bring him within striking distance of a switch-engine, there could be no recovery on the ground of the speed of the passenger train, since the instruction omitted the element of defendant's duty to take reasonable care to avoid injuring the deceased in the position in which he placed himself.—*Riley v. Northern Pacific Ry. Co.*, 545.

Same.

11. Error was not committed in refusing to instruct the jury in the case mentioned above, that there was nothing in the evidence showing traffic conditions at the crossing where the accident occurred between the early hours in the morning when deceased was killed, requiring the operation of crossing gates independently of any ordinance or regulation; the giving of this instruction would have withdrawn from the jury the question at issue, whether defendant exercised ordinary care in moving its engine across the street under all the circumstances disclosed.—*Riley v. Northern Pacific Ry. Co.*, 545.

Same—Ordinary Care—Question for Jury.

12. Whether or not the railroad company in the case above exercised ordinary care in moving its engine over a crossing provided with gates while the gates were up, and in the absence of a watchman in the tower, was a question for the jury.—*Riley v. Northern Pacific Ry. Co.*, 545.

Same.

13. It was also a question for the jury to decide whether the defendant company, in the exercise of ordinary care, might have discovered the position of the deceased in time to have avoided injuring him, irrespective of the question whether deceased had exercised ordinary care in going into the place where he was killed, or not.—*Riley v. Northern Pacific Ry. Co.*, 545.

Same—Care Required by.

14. Upon a railroad company is imposed the duty of using all reasonable efforts to avoid injury to one who has accidentally placed himself in a position of danger, if it knows the peril, or, by the exercise of reasonable care, might have known it.—*Riley v. Northern Pacific Ry. Co.*, 545.

Negligence—Contributory Negligence—Last Clear Chance—Instructions—Argument—Issues.

15. Where all the testimony in the above case relating to the last clear chance to avoid the injury, went in without objection under the issues made by the complaint and answer, the doctrine of the last clear chance was a legitimate subject for argument to the jury and of instruction by the court, though no such issue was raised by the reply to the plea of contributory negligence.—*Riley v. Northern Pacific Ry. Co.*, 545.

Interstate Commerce—Regulating Hours of Labor—Power of Legislature—Constitution.

16. In the absence of legislation by Congress on the matter of regulating the hours of labor, etc., of certain railway employees in this state, even though engaged in interstate commerce, such regulation was a matter of state control under the exercise of its police power; hence the Act of February 5, 1907 (Laws 1907, p. 6), making such provision and providing penalties for violation thereof, was not an attempt to regulate interstate commerce in contravention of the federal Constitution.—*State v. Northern Pacific Ry. Co.*, 582.

Federal and State Statutes on Same Subject—Effect.

17. The Act of February 5, 1907 (Laws 1907, p. 6), regulating the hours of labor, etc., of certain railway employees in this state was not rendered inoperative by the enactment of a similar statute by Congress, approved March 4, 1907, which, however, was not to become effective until March 4, 1908; but, in the absence of any declaration by Congress indicating the intention to at once supersede existing state legislation on the subject, the state law remained in full force until the federal Act went into effect.—*State v. Northern Pacific Ry. Co.*, 582.

RATIFICATION.

See Insurance, 14; Principal and Agent, 4.

REAL PROPERTY.

See, also, Fixtures; Mines and Mining, 2-4.

Lost Monuments—Parol Evidence.

1. Where monuments or marks called for in a deed are lost or otherwise uncertain, their location may be proved by parol evidence.—*Collins v. McKay*, 123.

Execution Sales—Purchaser from Judgment Debtor—Title Acquired—Liens—Deficiency Judgment.

2. *Held*, under section 1197, and sections 1233-1236, Code of Civil Procedure, that where real estate is sold under execution and bid in by the judgment creditor for less than the amount of his judgment, the judgment debtor may transfer the interest remaining in him, during the period of redemption, to a third person, who, upon redemption within the statutory time, acquires the legal title free from the lien of a deficiency judgment theretofore entered.—*McQueeney v. Toomey*, 282.

Equity—Decrees—Liens.

3. When properly docketed, a decree in equity becomes a lien upon the real estate of the debtor.—*Raymond v. Blanegrass*, 449.

RECORD.

See Appeal and Error, 4, 6, 9, 15, 41; Criminal Law, 38, 39, 40, 51.

REDEMPTION.

See Real Property, 2.

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See Personal Injuries, 3.

REVIEW.

See Appeal and Error.

ROBBERY.

See Criminal Law, 22-31.

RULES OF SUPREME COURT.

See Supreme Court, 2-6.

SCHOOLS.

Constitution—Power of Legislature.

1. Section 1, Article XI, of the Constitution commands the legislature to make provision for a general, uniform and thorough system of public free common schools. Section 11 of the same Article provides for the supervision and control of the state educational institutions. *Held*, that these provisions are not exclusive so as to limit the legislative power to the establishment and maintenance of common schools and state institutions only, but that other schools, such as county free high schools, may be established under these sections.—*Evers v. Hudson*, 135.

SEAL.

Clerk of District Court—Mandatory Statutes.

1. The provisions of section 4645 of the Political Code, prescribing, among other things, that the clerk of the district court, when issuing jurors' certificates, must impress his seal upon them, are mandatory, as are also those of section 4350, relative to how county moneys must be disbursed by the county treasurer.—*In re Farrell*, 254.

Criminal Law—Forgery—Void Instrument—*Habeas Corpus*.

2. Complainant was convicted under an information charging that, while acting as deputy clerk of the district court, he forged a juror's certificate. The certificate did not bear the seal required by section 4645 of the Political Code. *Held*, on application for writ of *habeas corpus*, that, section 4645 being mandatory and not directory merely, the certificate in the absence of the seal did not constitute a legal liability against the county, but was void on its face, that, therefore, a charge of forgery could not be predicated upon it, and that complainant was entitled to his release from custody.—*In re Farrell*, 254.

SHERIFFS.

Deputies—Power of Appointment—County Commissioners—Statutes—Construction.

1. The Act of 1905, amendatory of section 4597 of the Political Code (Laws 1905, p. 164), providing, among other things, that the sheriff in a third-class county shall be allowed two deputies, and that such officer "may appoint two deputies * * * who shall act as jailers," does not, by the latter provision, create a new class of deputies, separate and distinct from those first referred to, or lodge in the sheriff exclusively the power of appointment without the consent or approval of the board of county commissioners, but simply amounts to an increase of the maximum number he may appoint, subject to the approval of the board, as provided by Act of 1893 (Sess. Laws 1893, p. 60), which Act was not repealed by implication by any pro-

vision of the Political Code, thereafter adopted.—*Hogan v. Cascade County*, 183.

SIC UTERE TUO UT ALIENUM NON LAEDAS.

Applicability of Maxim.

1. The doctrine of the maxim, *Sic utere tuo ut alienum non laedas*, is not inconsistent with the rule of law that a man may use his own property as he pleases for all purposes for which it is adaptable, without being answerable for the consequences, if he is not an active agent in designedly causing injury, if he does not create a nuisance, or if he exercises due care and caution to prevent injury.—*Fleming v. Lockwood*, 384.

SIDEWALKS.

See *Municipal Corporations*.

SPECIFIC PERFORMANCE.

Nonsuit—Judicial Discretion.

1. The discretion with which the district court is vested in determining whether or not a contract should be specifically enforced is a sound legal one; therefore, where the testimony of plaintiff in such a suit furnished no ground for different conclusions, but showed that plaintiff was entitled to the relief asked, no grounds for the exercise of judicial discretion existed, and the motion of defendant for a "nonsuit" should have been overruled.—*Stevens v. Trafton*, 520.

Nonsuit—Discretion—Appeal.

2. In an action for specific performance of a contract, if plaintiff is not entitled to relief, as of right, then upon a motion for "nonsuit" at the close of plaintiff's testimony it is the trial court's duty to adjudicate the issues between the parties, and the court may exercise a legal discretion in giving or withholding relief; hence the effect of nonsuit would not be to determine that plaintiff was not entitled to relief in any view of the evidence, but that the court, in the exercise of its discretion, withheld relief in that particular case, and its action will not be disturbed on appeal unless there was an abuse of discretion.—*Stevens v. Trafton*, 520.

Oral Agreement—Performance.

3. Where it appeared from plaintiff's evidence in a suit to enforce specific performance of an oral contract to sell real property, that he had fully performed all the terms of the agreement to be performed by him, and that defendant had put him in actual possession of the premises upon which he had erected substantial improvements, the court had the power, under section 2342 of the Civil Code, to grant the relief asked for.—*Stevens v. Trafton*, 520.

Evidence—Review—Nonsuit.

4. Evidence of plaintiff in a suit to enforce the specific performance of an oral agreement for the sale of a lot, reviewed, and held sufficient to entitle plaintiff to a decree, and that the court erred in granting a "nonsuit."—*Stevens v. Trafton*, 520.

Nonsuit.

5. The fact that plaintiff in the suit referred to in the foregoing paragraph produced two receipts, which by their recitals, "balance in six months" and "part payment on lot," injected the only element of uncertainty into plaintiff's case, did not warrant a court of equity in disregarding his positive testimony as to his full performance of the

agreement and granting a "nonsuit," especially in view of the failure of counsel to ask plaintiff for an explanation in this regard.—*Stevens v. Trafton*, 520.

Same.

6. The court, in passing upon the motion for "nonsuit" in the above case, should have taken into consideration defendant's general denial which gave it no intimation of the nature of the defense relied upon, and which may have had concealed within it either a valid defense or an absolutely unconscionable one, and should, in view of plaintiff's positive testimony that he had fully performed his part of the agreement, have denied the motion.—*Stevens v. Trafton*, 520.

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STATUTES AND STATUTORY CONSTRUCTION.

Title—Meaningless Words—Elimination—Constitution.

1. Meaningless words or phrases in the title of an Act may be discarded by construction, and if, after such elimination, the title clearly expresses the subject embraced in the Act, it is not objectionable to

the provision of Section 23, Article V, of the Constitution, that the subject of every bill shall be clearly set forth in its title.—Evers v. Hudson, 135.

County Free High Schools—Title.

2. *Held*, that the title to Chapter 29, Laws of 1907, page 50, relating to the establishment and maintenance of county free high schools, is not so defective as to violate the provisions of section 23, Article V, of the Constitution. Omitting the meaningless portion found in the latter part of the title, it is clear and comprehensive, and could not have been misunderstood by the legislature or the people.—Evers v. Hudson, 135.

Title—More than One Subject—Constitution.

3. In determining the question whether an Act offends against the constitutional inhibition that no bill shall be passed containing more than one subject (Const., Art. 5, Sec. 23), the object sought to be accomplished by the legislation is a proper subject of inquiry.—Evers v. Hudson, 135.

Same.

4. If all parts of a statute have a natural connection and can reasonably be said to relate, directly or indirectly, to one general and legitimate subject of legislation, the Act is not open to the charge that it violates the constitutional provision of section 23, Article V, of the Constitution, that no bill shall be passed containing more than one subject.—Evers v. Hudson, 135.

County Free High Schools—Title—More Than One Subject—Constitution.

5. *Held*, under the rule set forth in the foregoing paragraph, that the Act of 1907, page 50 (Chapter 29), does not contain more than one subject, to-wit, provision for the establishment and maintenance of county free high schools, and for validating all acts done under enactments of the legislature passed on the subject at prior sessions. Evers v. Hudson, 135.

Bills for Raising Revenue—Free County High Schools—Constitution.

6. The constitutional provision that all bills for raising revenue shall originate in the house of representatives (Const., Art. V, sec. 32) is confined in its meaning to bills to levy taxes, strictly speaking, and does not extend to bills for other purposes, but which may incidentally create revenue; hence, the Act of 1907, page 50 (Chapter 29), which originated in the senate, and which, in sections 8 and 9, makes provision for a tax to supply funds for the current expenses of the county free high schools, and for bond issues which may be necessary to raise money to build or purchase school property, does not run counter to the Constitution in this respect.—Evers v. Hudson, 135.

County Free High Schools—Delegation of Legislative Power.

7. *Held*, that the Act of 1907, Chapter 29, page 50, authorizing the establishment of county free high schools, being a local option law, of uniform operation, the taking effect of which in any particular county is made dependent upon a favorable vote of the electors of such county, is not an unwarranted delegation of legislative power to such electors.—Evers v. Hudson, 135.

Same—Power of Legislature.

8. Section 1, Article XI, of the Constitution commands the legislature to make provision for a general, uniform and thorough system of public free common schools. Section 11 of the same Article provides for the supervision and control of the state educational institutions. *Held*, that these provisions are not exclusive so as to limit the legislative power to the establishment and maintenance of common

schools and state institutions only, but that other schools, such as county free high schools, may be established under these sections.—*Evers v. Hudson*, 135.

Same—Location—Legislative Power.

9. The fact that by section 3 of the Act establishing county free high schools (Laws 1907, Chapter 29, p. 50) the electors who favor the establishment of such schools are designated as the persons who shall determine the location of it, is not a valid objection to its constitutionality as depriving those opposed to such school of the right to vote on the question of its location, contrary to section 2, Article IX, of the Constitution, providing that every male person possessing the necessary qualifications shall have the right to vote upon all questions which may be submitted to the vote of the people.—*Evers v. Hudson*, 135.

Failure of Governor to Approve—Effect.

10. The Act above provides that it "shall take effect and be in full force from and after its passage and approval by the governor." It was never expressly approved by the governor, but became a law pursuant to section 12, Article VII, of the Constitution. *Held*, that the provision of this section, that if any bill be not returned by the governor within five days after presentment to him, it shall be a law, in like manner as if he had signed it, is binding upon the legislature, and that the Act became a law notwithstanding the provision in the Act above referred to.—*Evers v. Hudson*, 135.

Legislative Policy.

11. In the construction of statutes, courts are not at liberty to question the legislative wisdom or policy.—*Evers v. Hudson*, 135.

County Free High Schools—Elections—Proclamation—Notice.

12. Section 3 of the Act of 1907, making provision for the establishment of county free high schools (Laws 1907, Chapter 29, p. 50), declares that the special election therein mentioned "shall be conducted in accordance with the general election laws of the state." It provides for a notice of election, but makes no mention of an election proclamation. *Held*, that the general election laws are applicable to such special election, except in so far as superseded by the special provisions of the Act, and that the notice of election does not take the place of the election proclamation, made necessary by the reference to the general election laws.—*Evers v. Hudson*, 135.

Sheriffs—Deputies—Power of Appointment—County Commissioners.

13. The Act of 1905, amendatory of section 4597 of the Political Code (Laws 1905, p. 164), providing, among other things, that the sheriff in a third-class county shall be allowed two deputies, and that such officer "may appoint two deputies * * * who shall act as jailers," does not, by the latter provision, create a new class of deputies, separate and distinct from those first referred to, or lodge in the sheriff exclusively the power of appointment without the consent or approval of the board of county commissioners, but simply amounts to an increase of the maximum number he may appoint, subject to the approval of the board, as provided by Act of 1893 (Sess. Laws 1893, p. 60), which Act was not repealed by implication by any provision of the Political Code thereafter adopted.—*Hogan v. Cascade County*, 183.

Railways—Liability to Employees—Constitution—Equal Protection of Laws.

14. *Held*, that the enactment of Chapter 83 of Laws of 1903, page 156, relative to the liability of railway corporations for damages sustained by an employee by reason of the negligence of certain of his

therein enumerated coemployees, is a valid exercise of legislative power, under Article XV, sections 2 and 3 of the Constitution, reserving to the state the right to alter or amend corporate charters theretofore granted; and that, therefore, the Act is not open to the objection that it deprives railway corporations of the equal protection of the laws, guaranteed to all under the Fourteenth Amendment to the United States Constitution, by subjecting them to liabilities not imposed upon natural persons or other corporations engaged in the same pursuit.—*Lewis v. Northern Pac. Ry. Co.*, 207.

Construction—Constitution—Equal Protection of Laws.

15. The general purpose of the Act above, being to protect railroad employees in their particularly hazardous employment, it might be held not to violate the equal protection of the law clause of the United States Constitution, under the rule of statutory construction that, where the general purpose of a statute has been ascertained, general words may be restricted to a particular meaning, or those of a restricted meaning expanded so as to embrace the general purpose and effectuate it,—by holding that the expression “railway corporation,” therein found, includes all persons, both individual and corporate, engaged in operating railways.—*Lewis v. Northern Pac. Ry. Co.*, 207.

Criminal Law—Prior Conviction of Burglary—Punishment—Statutes.

16. Defendant was convicted of the crime of robbery, the penalty for which offense may be, under Penal Code, section 392, from one to twenty years’ imprisonment. He was also found to have been previously convicted in a foreign state of burglary. The court imposed a sentence of fifty years in the state prison. Subdivision 1 of section 1232, Penal Code, provides that one, once convicted of a felony, who is thereafter again convicted of an offense which would be punishable upon a first conviction by imprisonment in the state prison for any term exceeding five years, is then punishable by such imprisonment for not less than ten years. *Held*, that the meaning of subdivision 1 above is, that if the maximum punishment for the offense for which defendant was on trial (robbery in this instance) is more, but not less, than five years’ imprisonment, then his punishment could not be less than ten years, and might be extended to life imprisonment; and, hence, that the sentence of fifty years in this case was not unwarranted by law.—*State v. Paisley*, 237.

Clerk of District Court—Seal—Mandatory Statutes.

17. The provisions of section 4645 of the Political Code, prescribing, among other things, that the clerk of the district court when issuing jurors’ certificates, must impress his seal upon them, are mandatory, as are also those of section 4350, relative to how county moneys must be disbursed by the county treasurer.—*In re Farrell*, 237.

Adopted from Other States After Construction—Effect.

18. The legislature, by adopting statutes from another state after the same had been construed by its courts, adopts also the interpretation thus placed upon them.—*McQueeney v. Toomey*, 282.

Headnotes—Chapter and Section Headings.

19. In the construction of statutes, the meaning of which is in doubt, the headnotes, chapter and section headings may properly be examined.—*In re Wisner*, 298.

Same—Statutes Adopted from Foreign States After Construction.

20. Where the statute of a foreign state has been construed by its courts prior to its adoption by the legislature of this state, the interpretation so placed upon it is also adopted.—*In re Wisner*, 298.

Penal Statutes—Construction—Doubt as to Meaning—How Resolved.

21. If, in construing a penal statute, the court should entertain a reasonable doubt as to its meaning, such doubt must be resolved in favor of the defendant attacking an information based upon the provisions of such statute.—*In re Wisner*, 298.

Same.

22. While the construction of penal statutes should not be so strict as to defeat the plain intent of the legislature, it must give the words employed the sense in which they were obviously used; and if then the legislative intent cannot be given effect, the law must fall.—*In re Wisner*, 298.

Execution Sales—Personal Property.

23. Section 1232, Code of Civil Procedure, relating to sheriff's sale under execution, provides that, when the purchaser of any "real" property, not capable of manual delivery, pays the purchase money, the officer making the sale must execute and deliver to him a certificate of sale. *Held*, that the word "real" in this section was used by mistake, and that the word "personal" should be substituted therefor.—*Raymond v. Blancgrass*, 449.

Criminal Law—Verdict—Jury—Calling of Names.

24. The purpose of section 2142, Penal Code, providing that the names of the jurors must be called by the clerk when their verdict is delivered, is to insure their presence before the verdict is delivered.—*State v. De Lea*, 531.

Tax Deeds—Strict Construction of Statutes.

25. A county cannot purchase lands at a tax sale unless authorized to do so by law, and the provisions of the statute relative to sales for delinquent taxes must be strictly pursued before the owner can be divested of title.—*Rush v. Lewis & Clark County et al.*, 566.

Railroads—Interstate Commerce—Regulating Hours of Labor—Power of Legislature—Constitution.

26. In the absence of legislation by Congress on the matter of regulating the hours of labor, etc., of certain railway employees in this state, even though engaged in interstate commerce, such regulation was a matter of state control under the exercise of its police power; hence the Act of February 5, 1907 (Laws 1907, p. 6), making such provision and providing penalties for violation thereof, was not an attempt to regulate interstate commerce in contravention of the federal Constitution.—*State v. Northern Pac. Ry. Co.*, 582.

Same—Federal and State Statutes on Same Subject—Effect.

27. The Act of February 5, 1907 (Laws 1907, p. 6), regulating the hours of labor, etc., of certain railway employees in this state was not rendered inoperative by the enactment of a similar statute by Congress, approved March 4, 1907, which, however, was not to become effective until March 4, 1908; but, in the absence of any declaration by Congress indicating the intention to at once supersede existing state legislation on the subject, the state law remained in full force until the federal Act went into effect.—*State v. Northern Pac. Ry. Co.*, 582.

STATUTE OF FRAUDS.

Promise to Pay Debt of Another—Agreement by Partner to Pay Firm Debt—Consideration.

1. Section 3612, subdivision 3, of the Civil Code, provides that a promise to answer for the antecedent obligation of another need not be in writing, where the promise is made upon a consideration bene-

ficial to the promisor. Upon the winding up of a copartnership of which defendant was a member, he retained certain partnership funds and agreed to pay plaintiff a debt due him for wages from the firm. *Held*, that defendant's promise was upon a consideration, beneficial to himself, under section 3612, and was valid, though not in writing.—*Carlson v. Barker*, 486.

STAY.

See Supersedeas, 1.

STIPULATIONS.

See Judgments, 5.

STREETS.

See Highways.

SUBSTITUTION.

See Interpleader.

SUPERSEDEAS.

Mandamus—Appeal—Stay.

1. Even if a stay, in a case where a writ of mandate is issued by the district court to compel the transfer of a cause from a police to a justice of the peace court, is not provided for in the Code of Civil procedure (a question not decided), still the supreme court has power, under section 3, Article VIII of the Constitution, to issue a *supersedeas*, or any other appropriate writ, to effectuate its appellate jurisdiction, and thus to insure to the aggrieved party an appeal which might otherwise be of no value.—*State ex rel. Brass v. Horn*, 418.

SUPREME COURT.

See, also, Equity, 5-7, 16, 17.

Bankruptcy—Decisions of Supreme Court of United States—Conclusiveness.

1. In construing the provisions of the Bankruptcy Act, a decision of the supreme court of the United States directly applicable to the question presented to a state court is conclusive.—*Hamilton v. Smith*, 1.

Rules—Binding upon Whom—Appeal.

2. The rules of the supreme court, when adopted under the limitations prescribed by section 111, Code of Civil Procedure, have the force of statutes, and are binding upon district courts and their officers in so far as such courts and officers have to do with appellate procedure.—*State ex rel. Connors v. Foster*, 278.

Criminal Law—Appeal—Record—Rules—Clerks of District Courts.

3. The copy of the record which the clerk of the district court is required, by section 2281, Penal Code, to prepare upon the filing of a notice of appeal in a criminal cause, and transmit to the clerk of the supreme court, must meet the requirements of Rule VI, subdivision 2, and Rule VII of the appellate court, relative to the preparation and arrangement of transcripts on appeal.—*State ex rel. Connors v. Foster*, 278.

Same—Record on Appeal—Clerks of District Courts—Compensation.

4. *Quære*: Is the clerk of the district court entitled to compensation from his county for the performance of the duty imposed upon him

by section 2281, Penal Code, and the Rules of the supreme court, to furnish a copy of the record on appeal in a criminal cause in proper form?—State ex rel. Connors v. Foster, 278.

Appeal—Briefs—Rules.

5. A brief which substantially complies with Rule X of this court, with relation to its contents, is sufficient.—McIntosh v. Jones, 467.

Record on Appeal—Failure to File in Time—Dismissal—Rules.

6. An appeal will be dismissed where appellant fails to file his transcript within the time allowed by the rules of the supreme court. Courtney v. McGrath et al., 622.

SURPLUSAGE.

See Information, 8.

SURPRISE.

See Discretion, 8.

TAX DEEDS.

Nonecontiguous City Lots—Sale *en Masse*—Invalidity.

1. A tax deed to property assessed and sold under the provisions of the Fifth Division, Revised Statutes, 1879, the recitals in which showed that a number of nonecontiguous city lots were sold *en masse*, was void upon its face and inadmissible in evidence in a suit to quiet title.—North Real Estate L. & T. Co. v. Billings L. & T. Co., 356.

County—Competitive Bidder—Effect.

2. A tax deed which showed on its face that a county had been a competitive bidder at a sale for delinquent taxes, contrary to the provisions of section 3882 of the Political Code, is void.—Rush v. Lewis & Clark County et al., 566.

Recitals.

3. The recitals in a tax deed must show affirmatively that the county had a right to take the property, and that it was not a competitive bidder at the sale.—Rush v. Lewis & Clark County et al., 566.

Statutes—Strict Construction.

4. A county cannot purchase lands at a tax sale unless authorized to do so by law, and the provisions of the statute relative to sales for delinquent taxes must be strictly pursued before the owner can be divested of title.—Rush v. Lewis & Clark County et al., 566.

Construction—In Whose Favor.

5. A tax deed must be construed most strongly against him who claims under it, and if one of two constructions will support the claim of the person whose property has been taken, the deed will be held invalid.—Rush v. Lewis & Clark County et al., 566.

Same—Invalidity—Presumptions.

6. Where a tax deed showed its invalidity upon its face, in that the county had been a competitive bidder at the sale contrary to statute, the presumption that official duty had been regularly performed will not protect a grantee of the county, nor may in such a case the provisions of section 3897, Political Code, making tax deeds *prima facie* evidence of the fact, among other things, that the property was sold as prescribed by law, be relied upon.—Rush v. Lewis & Clark County et al., 566.

TAXES.

Invalidity—County Free High Schools—Elections—Proclamation—Notice.

1. Where the defendant county treasurer, in an action to enjoin the collection of a tax imposed for the purpose of establishing a county free high school pursuant to Act of 1907 (Laws 1907, Chapter 29, p. 50), interposed a demurrer, and thus admitted an allegation in the complaint that because of the failure of the board of county commissioners to proclaim the holding of a special election provided for in the Act, and of the clerk to give proper notice, a large number of qualified electors were prevented from voting, the voters had not been given that opportunity to freely and fairly give expression to their wishes, as contemplated by the election laws, and therefore the election was invalid, and the tax, levied in pursuance thereof, void. *Evers v. Hudson*, 135.

THEORY OF CASE.

See, also, Accounting, 1.

Appeal—Review.

1. On appeal, the supreme court will treat a cause on the same theory it was tried in the district court.—*Carlson v. Barker*, 486.

TRANSCRIPT.

See Record.

TRESPASS.

Trespass—Trespass on the Case.

1. The action of trespass presumes the doing of an act wantonly or in total disregard of another's rights; whereas, the action of trespass on the case assumes that the injury complained of is the result of negligence or nonfeasance.—*Fleming v. Lockwood*, 384.

Waters—Ditches—Injury—Seepage—Actions—Trespass on the Case—Burden of Proof.

2. Where, in an action to recover damages for injury alleged to have been caused to plaintiff's lands by seepage from defendant's ditch, it was not contended that the seepage was intentionally caused by defendant, nor claimed by the latter that it was the result of inevitable accident or an act of God, the injury, if it occurred at all, must have been the result of negligence on defendant's part in constructing or operating the ditch, and the action was maintainable only as an action of trespass on the case, in which the burden of proving defendant's negligence, in the first instance, was upon plaintiff.—*Fleming v. Lockwood*, 384.

TRUSTEES.

See Eminent Domain, 1.

VERDICT.

See, also, Criminal Law, 69-71.

Directed—When Properly Denied.

1. The denial of defendant's motion for an instructed verdict, in a personal injury case, where the evidence introduced on his behalf, while reasonably clear enough to have entitled him to a verdict, if believed by the jury, was contradictory of that offered by plaintiff, and did not

present a case so clear and indisputable as would have justified the giving of the peremptory instruction requested, was not error.—*Stephens v. Elliott*, 92.

Chance—Duty of District Court.

2. In an action for damages for personal injuries, the jury returned a verdict for \$18,750. Upon polling of the jury the court inquired if the verdict had been reached by chance. Several of the jurors' answer was in the affirmative. The court thereupon directed them to again retire and find a verdict by "deliberation and reasoning thereon," excluding the element of chance. A verdict for \$20,000 was then returned shortly afterward. *Held*, that the action of the court was unauthorized; that the verdict first returned should have been received, and that it could only be set aside upon application of the party aggrieved, under section 1171 of the Code of Civil Procedure, providing for a new trial on the ground that the jury had resorted to chance in arriving at their verdict.—*Harrington v. Butte, Anaconda & Pac. Ry. Co.*, 478.

False Imprisonment—Instructed—Denial.

3. Where the evidence of defendant, in an action for false imprisonment, did not make out so clear and indisputable a case as would have justified the court in giving a peremptory instruction for a verdict in his favor, its refusal to so direct was not error.—*Kroeger v. Passmore*, 504.

WAIVER.

See, also, Insurance, 9, 12; Interpleader, 2.

Justices of the Peace—Appeal—Irregularities.

1. By specifically waiving all previous irregularities and informalities, when appearing before a justice of the peace in a criminal cause which had been transferred from a police court, and of which both the justice and magistrate had jurisdiction, and submitting to trial without objection, defendant was precluded from thereafter attacking the resulting judgment on the ground that by reason of the failure of the police judge to transmit a copy of his docket to the justice of the peace, the latter did not acquire jurisdiction to try the cause.—*In re Graye*, 394.

Jurisdiction.

2. The rule that if a court has jurisdiction of the subject matter of an action, a general appearance of the defendant to the merits, without objection, is a waiver of all personal privilege in respect of the particular court in which the action is brought, applies to courts of limited as well as of general jurisdiction.—*In re Graye*, 394.

Criminal Law—Arraignment—Irregularities.

3. The minutes of the trial of a criminal cause failed to show that the copy of the information delivered to defendant contained the names of the witnesses for the state. They did show that he asked for and obtained time to plead and afterward, without objection, pleaded to the information. *Held*, that by pleading without objection he waived the defect in the arraignment.—*State v. De Lea*, 581.

WATERS AND WATER RIGHTS.

Ditches—Owner not an Insurer.

1. A ditch owner is not an insurer of his ditch against damages which may result from its operation.—*Fleming v. Lockwood*, 384.

Ditches—Seepage—Liability of Owner—Instructions.

2. Plaintiff in an action to recover damages alleged to have been caused to his lands by seepage from defendant's ditch asked the court to instruct the jury that if the injury was caused as alleged, the verdict should be for plaintiff, irrespective of the question of negligence on the part of defendant in the construction and operation of the ditch. This was refused and one given, in lieu thereof, announcing the rule that defendant was only bound to exercise ordinary care in the construction and maintenance of his ditch, and that, if he did so, he could not be held responsible. *Held*, that the court's action was correct.—*Fleming v. Lockwood*, 384.

Ditches—Injury—Seepage—Actions—Trespass on the Case—Burden of Proof.

3. Where, in an action to recover damages for injury alleged to have been caused to plaintiff's lands by seepage from defendant's ditch, it was not contended that the seepage was intentionally caused by defendant, nor claimed by the latter that it was the result of inevitable accident or an act of God, the injury, if it occurred at all, must have been the result of negligence on defendant's part in constructing or operating the ditch, and the action was maintainable only as an action of trespass on the case, in which the burden of proving defendant's negligence, in the first instance, was upon plaintiff.—*Fleming v. Lockwood*, 384.

Ditches—Negligence—Degree of Proof—Instructions—Harmless Error.

4. While it was error to instruct the jury in the case above mentioned, that, before plaintiff could recover, he must have established by a *clear* preponderance of the evidence that the ditch in question was negligently and defectively constructed or maintained, etc.—thus, by the use of the word "*clear*," imposing a greater burden upon plaintiff than the law requires—the error was harmless, where plaintiff did not rely upon defendant's negligence nor offer any evidence on that question, but took the erroneous position that defendant was an insurer of his ditch and responsible in any event, and where the court would have been justified in directing a verdict for defendant, in that plaintiff had failed to make out a case.—*Fleming v. Lockwood*, 384.

Ditches—View by Jury—Findings—Evidence—Insufficiency—New Trial.

5. The fact that in a water right suit, in which one of the principal questions at issue was the capacity of a ditch as of the date of appropriation—three years and seven months prior to the date of trial—the jurors were permitted to view the premises, was no ground for the denial of a motion for a new trial, based upon the insufficiency of the evidence to sustain a finding upon the question, where it appeared that in the interim between the date of appropriation and the time of trial the ditch had become greatly out of repair, so that the view had by the jury could not have been of much, if any, assistance to them in determining its capacity at the date of appropriation.—*White v. Barling*, 413.

WITNESSES.

See, also, Evidence, 23.

Competency—Transactions with Deceased Persons.

1. Where defendants, in a suit brought by plaintiff, as administrator, to quiet title to certain portions of mining property, claimed title under deeds of grant from plaintiff's intestate and prayed that their titles be quieted as against the estate represented by plaintiff, they were

simply attempting to protect themselves against the claims and demands of plaintiff, and were not asserting "a claim or demand against the estate" of deceased, so as to make them incompetent to testify, under the provisions of Laws of 1897, page 245, as to any matter of fact occurring before their grantor's death.—*Collins v. McKay*, 123.

Criminal Law—Police Officers—Detectives—Credibility—Instructions.

2. An instruction, requested by defendant charged with crime, to the effect that, in weighing the testimony given by police officers and detectives, the jury should exercise greater care than in the case of other witnesses, because of the natural and unavoidable tendency and bias of such persons to construe everything as evidence against the accused and disregard all matters which did not tend to support their preconceived opinions of the case, was properly refused. If given, it would have invaded the province of the jury and been erroneous under any circumstances.—*State v. Paisley*, 237.

Same—Instructions—Credibility of Defendant.

3. While it is the general rule that a court ought not in its instructions single out a particular witness and direct the attention of the jury to his testimony, section 2442, Penal Code, makes an exception to this rule, and the court may properly instruct that the jury, in judging the credibility of one on trial for a crime and the weight to be given to his testimony, may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he stands charged.—*State v. De Lea*, 531.

WORDS AND PHRASES.

"Accounting"—

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"Additional"—

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"Adverse Party"—

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- "Reasonable Doubt"—
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- "*Ees Ipsa Loquitur*"—
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- "*Sic Utere Tuo Ut Alienum Non Laedas*"—
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- "Thereupon"—
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- "Trespass"—
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WRITS.

See Habeas Corpus; Injunctions; Mandamus; Supersedeas.

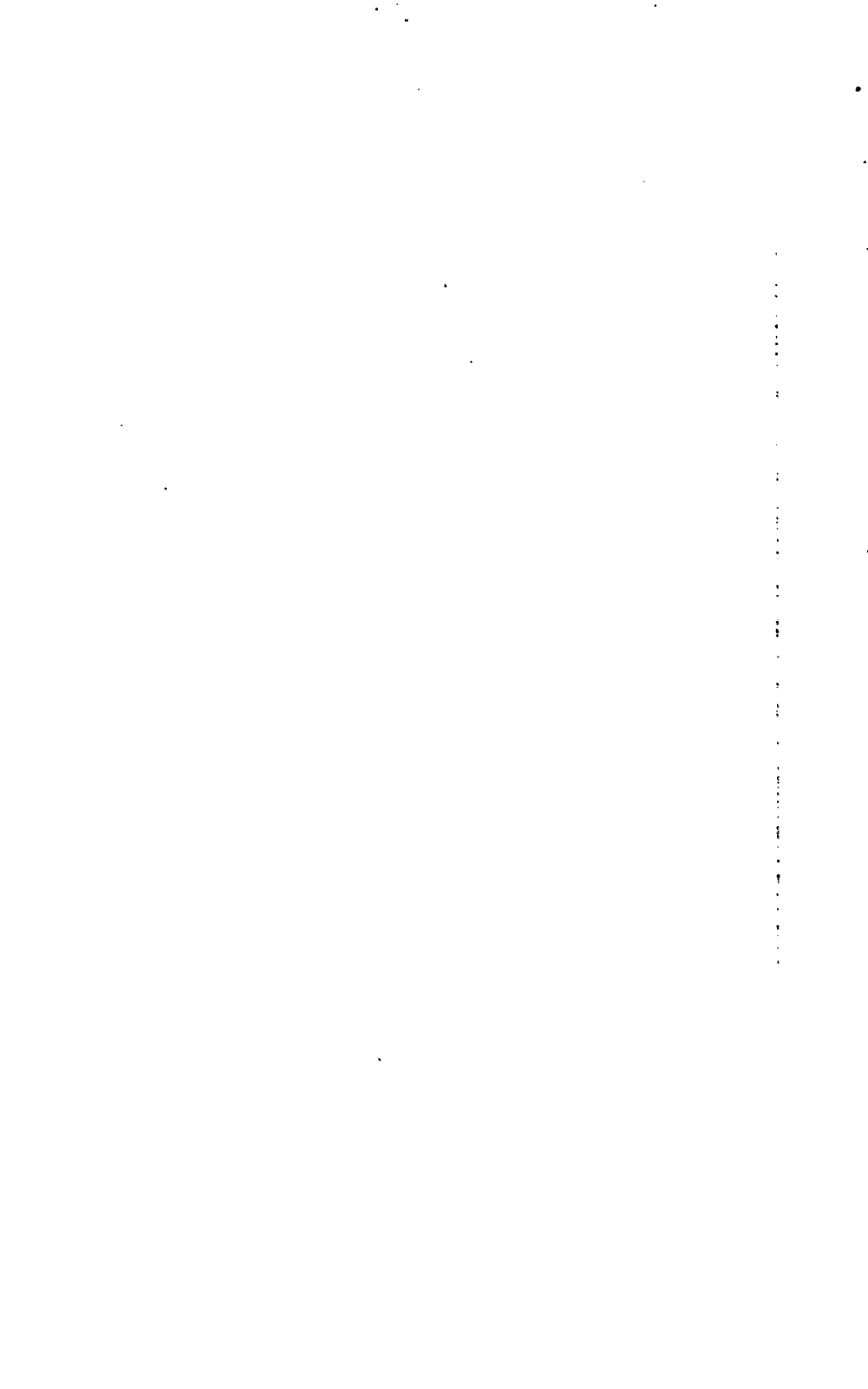


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